

**0806040 [2008] RRTA 431 (20 November 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0806040

**DIAC REFERENCE(S):** CLF2008/104584

**COUNTRY OF REFERENCE:** Eritrea

**TRIBUNAL MEMBER:** Andrew Jacovides

**DATE:** 20 November 2008

**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, being a person to whom Australia has protection obligations under the Refugees Convention.

## **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 Eritrea, 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 her 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 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 file CLF2008/104584, with the protection visa application and the delegate's decision, and the Refugee Review Tribunal (RRT) file 0806040, with the review application.

20. The applicant was represented in relation to the review by a registered migration agent.

#### *Department file CLF2008/104584*

21. The applicant stated in her protection visa application that she was a citizen of Eritrea. She stated that she was not born in Eritrea. She indicated that she was fluent in English and two other languages. The applicant stated that she had many years of education and she was employed. She indicated that she had family members in Eritrea, and in other countries.
22. The applicant claimed that she was targeted by the government of Eritrea because of her religious beliefs and her opposition to the government's decision to close a facility. She stated that she was subjected to excessive military service.
23. The applicant claimed that she belonged to a church which was banned by the government. She stated that when the church was denied registration its members worshiped in private homes. She claimed that she was found worshiping in a private home and imprisoned for a brief period. She claimed that she was subjected to torture by the authorities. The applicant claimed that she was forced to sign a document renouncing her religion. She stated that she considered fleeing to another country, where she had family members, but she had no right to enter and reside there and the government was deporting Eritreans who were living there. She stated that she remained in Eritrea and she refrained from further contact with her church.
24. The applicant claimed that after completing her studies she was employed by a particular employer and then transferred to another job. She claimed that she was discriminated against in various ways by the government because she was not considered a loyal subject. She claimed that she participated in a government run course to prove her loyalty and she was issued a certificate relating to her loyalty. The applicant claimed that she wanted to resign from her job and study overseas but she was not allowed to leave her employer or the country. She stated that the authorities considered it her civic duty to remain in Eritrea.
25. The applicant claimed that she was able to organize her departure from Eritrea by using Relative A's connections. She stated she agreed to work for the same employer when she completed her studies overseas. The applicant claimed that following her departure from Eritrea Family member X also fled the country. She claimed that Relative A and the person who facilitated her departure were arrested. The applicant claimed that the treatment of Relative A is indicative of the targeting she and her family have suffered since migrating to Eritrea. She stated that the government targeted many citizens of Eritrea for being disloyal. The applicant claimed that an adverse political opinion has been attributed to her by the

authorities in Eritrea because of her family background and her own political opinion. She claimed that she will be subjected to harm amounting to persecution, including imprisonment and torture, by the government of Eritrea for political reasons and her religion.

26. The applicant submitted a partial copy of her passport; other documents relating to her background, education, and employment; documents relating to her travel in Australia; a letter from a church group in Eritrea and another from her church in Australia; and emails relating to her travel in Australia.
27. The applicant was interviewed by the delegate. The interview was recorded and the Tribunal has listened to the interview. The applicant essentially repeated her core claims. She stated that after her imprisonment she did not attend a church. She stated that the letter she submitted from a representative of the evangelical church, was a letter of support which was given to her because she belonged to an affiliated group. The applicant claimed that she was not released by her employer or the government to travel overseas and she was forced to use Relative A's connections to facilitate her departure. She claimed that Relative A and the person who helped her were subsequently detained because she and Family member X had fled the country without the government's permission. The applicant claimed that after she learned that Family member X had fled the country, and Relative A was in prison, she decided to apply for a protection visa.
28. The delegate accepted some of the applicant's claims but essentially found that she was not subjected to persecution by the government in Eritrea and she was not at risk of persecution in the future for a Convention reason.

*MRT file 0806040*

29. The applicant did not provide any claims with the review application. The Tribunal received a submission from her migration agent.
30. The applicant's adviser argued that the applicant has a well-founded fear of persecution for reasons of her religion, her political opinion, and her membership of particular social group, that group being the unregistered evangelical church (which was banned by the government). The adviser argued that human rights conditions remain poor in Eritrea and the applicant could not defend herself or be safe from the harm she anticipates because the persecutor is the government. She argued that the government is implicated in widespread human rights violations against the citizens of Eritrea, particularly those who dissent. The adviser provided the following summary of the applicant's claims:

[The applicant] fears returning to Eritrea as she believes she would face imprisonment and torture because of the circumstances of her departure, her religious beliefs, her criticisms of the current Eritrean government, and her family and personal background. To her knowledge [Relative A] remains in jail, [family member] remains in [country]. [family member] was arrested for his religious beliefs and has never been seen or heard of since. [family member] was detained, tortured, rendered seriously ill and has since [information about the injury]. [The applicant] herself has suffered detention, physical torture, and discrimination because of her religious beliefs and political views.

31. The adviser submitted a statutory declaration, from a person claiming to know the applicant and her family in Eritrea. The author states that the applicant's family has been subjected to persecution by the government in Eritrea because of their religious beliefs. He stated that he

suffered persecution in Eritrea and he fled to Australia where he was granted a protection visa. The author states that his parents who live in Eritrea have confirmed the applicant's claim that her relative is in prison.

32. The adviser submitted a statutory declaration, from a person claiming to have been a good friend of the applicant's family member. The author stated, without providing details, that the applicant's family was subjected to persecution in Eritrea.
33. The adviser submitted reports from external sources dealing with the targeting of students and members of evangelical churches by the authorities in Eritrea.

*Information from external sources*

34. The Tribunal considered the following reports from external sources relating to human rights conditions in Eritrea:
  - US Dept. of State Country Report on Human Rights Practices 2007 (Released March 2008) at <http://www.state.gov/g/drl/rls/hrrpt/2007/100480.htm>
  - US Dept. of State, International Religious Freedom Report 2008 (Released September 2008) at <http://www.state.gov/g/drl/rls/irf/2008/108367.htm>.
  - UK Home Office Country of Origin Information Report (Released September 2008) at <http://www.homeoffice.gov.uk/rds/pdfs08/eritrea-011008.doc>.
  - Human Rights Watch World Report 2008 (Released January 2008) at <http://hrw.org/englishwr2k8/docs/2008/01/31/eritre17746.htm>.
  - The Eritrea section of Amnesty International Annual Report 2008 (Released 2008) at <http://thereport.amnesty.org/eng/regions/africa/eritrea>
35. The reports indicate that human rights conditions remain poor in Eritrea and the government does not tolerate dissent. The reports indicate that citizens targeted by the government face serious harm, including imprisonment and torture, with no opportunity to defend themselves.

**FINDINGS AND REASONS**

36. The applicant claims that she was not born in Eritrea but is a citizen of Eritrea. She claims that she has no right to enter and reside in her country of birth. After considering the evidence provided by the applicant in support of these claims, including a partial copy of her passport issued by the government of Eritrea, the Tribunal accepts the claims.
37. The applicant claims that she was subjected to treatment amounting to persecution by the authorities in Eritrea because she was involved with an unregistered evangelical church which was banned by the government. She claims that she was detained and subjected to serious harm by the authorities because she was still involved with the church. She claims that she was discriminated against and forced to perform excessive military service because of her family background, her religion, and her opposition to the government's decision to close a facility in Eritrea. She claims that she attended a political course to demonstrate her loyalty to the government. The applicant claims that her employer and the government did not allow her to leave the country and she was forced to use connections to facilitate her

departure. She claims that Relative A and another person assisted her to leave the country. The applicant claims that Relative A and the person who assisted her to leave the country, were detained after she left the country. She claims that Relative A remains in prison. She claims that an adverse political opinion has been attributed to her because of her family background, the activities of other family members, her unauthorized departure from Eritrea, and her decision to seek asylum overseas. She claims that she will be imprisoned and tortured by the government of Eritrea for reasons of religion, political opinion, and membership of a particular social group, that group being her church which was banned by the government.

38. The Tribunal has formed the view that the applicant was not subjected to persecution by the government of Eritrea at the time when she departed the country. The applicant's ability to access tertiary education and employment suggests that she had a privileged lifestyle relative to many other citizens of Eritrea.
39. However, the Tribunal accepts the applicant's claim that she belonged to a church which was banned and she was detained because of her involvement with the unregistered church. The Tribunal accepts her claim that she was detained and during that period she was subjected to treatment amounting to persecution. It accepts her claim that she was forced to renounce her church and prevented from participating in religious activities of her choice. The Tribunal accepts the applicant's claim that she will be prevented from participating in the church of her choice if she returns to Eritrea in the reasonably foreseeable future. The Tribunal finds that these circumstances alone could give rise to a well-founded fear of persecution for Convention purposes.
40. Nevertheless, the Tribunal finds that the most immediate risk of serious harm which the applicant faces in Eritrea relates to her political opinion and the political opinion which will be attributed to her by the government of Eritrea. The Tribunal finds that the applicant's unauthorized departure from Eritrea, her application for refugee status, her criticism of the Eritrean government, and her family background, has and will continue to attract the adverse interest of the authorities and the government in Eritrea. The human rights reports referred to above, indicate to the Tribunal that the Eritrean government does not tolerate dissent (real or imagined) and citizens targeted by the authorities have no means of defending themselves. The reports indicate that the authorities commit human rights abuses with impunity.
41. The Tribunal has formed the view that the applicant faces a real chance of serious harm by the authorities in Eritrea, including detention and physical abuse, for reasons of political opinion, such that she has a well-founded fear of persecution for Convention purposes.
42. Accordingly, the Tribunal finds that the applicant faces a real chance of serious harm, amounting to persecution, by the government of Eritrea, for the essential and significant reason of political opinion.
43. The applicant has provided other claims in support of the application. However, in view of the above finding, the Tribunal does not consider it necessary to consider those other claims.

## **CONCLUSIONS**

44. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

## **DECISION**

45. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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