

0901487 [2009] RRTA 621 (23 July 2009)

DECISION RECORD

RRT CASE NUMBER: 0901487
DIAC REFERENCE(S): CLF2008/132082
COUNTRY OF REFERENCE: Malaysia
TRIBUNAL MEMBER: Alan Gregory
DATE: 23 July 2009
PLACE OF DECISION: Melbourne

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 Malaysia, arrived in Australia [in] August 2008 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] September 2008. The delegate decided to refuse to grant the visa [in] February 2009 and notified the applicant of the decision and her review rights by letter dated [in] February 2009.
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 [in] March 2009 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 claims to be a citizen of Malaysia and given her passport and evidence on file the Tribunal accepts that she is a national of Malaysia. (D f 29) The applicant is described as a Tamil Hindu, who has 11 years education and who has been employed in a clerical capacity her last post being held for two years until May 2008. She speaks Tamil, English and Malay, and has resided in Selangor.
21. In response to Question 41 "Why did you leave that country?", the applicant stated that because she had a de facto relationship with someone she had known for five years, but about five months ago he converted to Islam. She remained living with him as usual as she did not know of his conversion. One day a group from the Islam Association, "Haji and Usthz" came to the house and asked her to convert to Islam. She refused. They said she had to go to their [town deleted: s431 of the Migration Act 1958 as this information may identify the applicant] Office to record her objection. They kept her in, "in house" arrest for 5 days and talked to her about religion and tried to convert her. She said she was mentally tortured by this attempt to convert her, and so without anyone knowing she left the country and the Islam Association would have charged her and put her into prison.
22. In response to Question 42 "What do you fear may happen to you if you go back to that country?" the applicant stated the Islam Association is a big organisation and according to Syariah (sic) law they will put her into prison if she does not convert. She states that the Association will also threaten her to make her marry her de facto as they have been living together for five years. According to Syariah law a Muslim man cannot live with any woman before their marriage and since she has been caught doing that they will charge me in the Syariah Court.
23. In response to Question 43 "Who do you think may harm/mistreat you if you go back?" the applicant stated "the Islam Association and my de facto".
24. In response to Question 44 "Why do you think this will happen to you if you go back?" the applicant stated that the Islam Association and her de facto will force and threaten to convert her to Islam. No one will intervene as it is a religious matter. Once she converts she will be governed by Syariah law and the government cannot interfere in her problem.
25. In response to Question 45 "Do you think the authorities of that country can and will protect you if you go back? If not why not?" The applicant stated - No. She said that the Muslim

religion never protects a Hindu, unless she converts to Islam. Since she has lived with her de facto for 5 years the Muslim Association will charge her under Syariah Law.

26. A hearing was scheduled [in] April 2009. However, the applicant did not present for the scheduled hearing of which due notice had been given. However, an explanation arrived later which the Tribunal accepted and a further hearing was arranged.
27. The hearing was held [in] June 2009 at which the applicant gave evidence and she was assisted by a Tamil interpreter. She also tabled three sheets, one showing the address listed in her passport (a close friend's address), the address of her mother and the address of where she had lived where her ex de-facto lives (his name is also provided). Also she presented a sheet of documents showing her ID card for Malaysia and her driving licence, these were produced to show that she regarded her mother's address her proper address. There was also a statement in Tamil from the regional president of the Malaysian Indian Congress, but the Tribunal pointed out that as this document was not translated it could not give it proper regard. The letter from the Malaysian Indian Congress was signed by the regional chairman Mr A Maheswaran.
28. The applicant said she came to Australia [in] August 2008, and she came as she was fleeing from an intolerable situation for herself. Referring to her claims the Tribunal asked her if she had become engaged to her de facto, she said she had and they had planned to marry and to raise a family, but there were problems that arose in the relationship. The issue came to a head she said, when her de facto suddenly and without informing her converted to Islam. He was also of Tamil origin and was a Hindu like herself. The conversion of her de facto created tremendous problems for her.
29. The applicant said she had no friends here, and came here herself and also made her application for a Protection visa herself. She had at first stayed in a backpacker's place, and then was advised by Chinese people she met to find somewhere less expensive, so she first went to a caravan park in [town deleted:s431(2)] and now was in a house, where a person who was active in Red Cross had given her a room rent free and had assisted her. She said her landlord provided her with food and had assisted her. She had brought only a modest amount of money here, and had spent it. She said she had not worked but she believed she was able to work.
30. The applicant said that she had been in this relationship with her de facto since 2003, and he was then a Tamil Hindu, he worked as a government employee in a road construction work, but really he acted as a police informer. She said she had worked as a clerk for a private company for two years. She said her mother lived some distance away near Kuala Lumpur, she did not live near her mother (her father was deceased). She said her mother was poor and lived on a modest pension from her father. Asked why her de facto had not married her, she said there was a financial barrier to marriage and furthermore she had some unease about her de facto, as he was involved in drugs. She began to doubt the relationship given his involvement in drugs. Her faith in him was becoming less and less. Asked if her mother approved of her living in a de facto relationship with a man, she said her mother supported her and today in Malaysia things were different.
31. Asked if her relationship with her de facto was over she said it was. However he had not given her up. She said if she returned she would not go back to him.

32. The applicant said that the ex de facto still tried to find her, he did not know she was in Australia, and he kept pestering her mother to try and find out where she was. He also visited all people he knew were her friends to try and find her. She said he also telephoned her mother frequently. Asked if this was still continuing she said it was and she felt she should no longer ring her mother, as he might find out where she was if he did. She said her mother was very worried about the situation. He called on her mother at any time, as he was close to the police and did not fear anything.
33. The applicant said she had left him and her mother had told her ex de facto that the relationship was over and that she had finished with him. However he would not accept that and would not allow her to live in peace. He once confined her to the house and would not leave or go to work and he then threw hot water over her legs.
34. The applicant said if she had continued to live with him she would be forced to convert to Islam. As the law in Malaysia meant that if a Moslem married a non Moslem, the non Moslem had to convert. Asked how long she was confined she said for one week. Asked if she had sought police protection she said she had, and she had gone to the police on four occasions for help. The police agreed to take her complaint, and she wrote it out it was stamped but there was no action from this. She said the police told her he was a good man and would not do these things to her, as her de facto was very friendly with the police. The police inspector said he would talk to her de facto and effect a compromise.
35. The applicant said that after the last event when she complained to the police for the fourth time, and she felt no action was being taken she left her de facto.
36. The applicant said that the local Islamic Association representatives, three of them came and took her to a special place. Asked if they had the power to do so, she said that under Shariah Law they had assumed that power They regarded her as married to her de facto, as they had been in a sexual relationship and the Islamic group regarded this as them being married and so subject to them. So she was taken to this place and kept for a week, and told how to pray and about Islam, made to wear a scarf and made to eat beef. She told the police about this too, but no action was taken. The Shariah Law people regarded her as married to her de facto
37. The Tribunal asked the applicant is she could substantiate any of these claims with any other evidence, she said her neighbour knew of these events and her neighbour had taken her to the police station. Again she said the police took her statement but gave her no receipt for that and nothing happened. She said four times she had gone to the police and nothing happened.
38. The applicant said she then ran away first to her mother and then a friend took her, a friend her de facto did not know about and so could not find her, and this allowed her to escape to Australia. She said she was still Hindu and observed the customs but did not know if any Hindu temple near where she was in [town deleted s431(2)] to attend. She said the branch president of the Malaysian Indian Congress knew her from child hood and knew of her situation and this letter (then not translated) referred to this. He had tried to speak to her de facto about the whole matter but the de facto would not listen or enter into a discussion about the matter.
39. Asked if she could relocate to a different part of Malaysia she said she felt her husband had such close contact with the police, that she would be found. She said her ex de facto was a drug informer who was very close to the police, he had their support and he knew people everywhere She said she also knew her de facto was taking drugs himself and was involved

in them. It was only that she knew a friend he did not know that she was able to escape. She really only had her mother to go to, and he, the de facto was always there trying to find her, and find out where she was. She said she had no affection for him anymore, especially with his involvement in drugs and in his conversion.

40. The applicant said that his drug involvement as well as his conversion to Islam ended their relationship. She said he was not only a police informer about drugs, but he had some involvement in drugs himself.
41. The Tribunal gave the applicant until [date] July 2009 to provide further information, specifically to provide a translation of the letter from the regional president of the Malaysian Indian Congress, and to obtain a detailed statement from her neighbour about the claims the applicant made about her being taken by the Islamic Association people and her going to the police.
42. [In] July 2009 the Tribunal received a response from the applicant. There was first a letter from [Mr A], dated [in] June 2009 and translated. Mr A resides in the house adjacent to the applicant. He states that the applicant lived with her de facto without being married to him. however, he embraced Islam and tried to force her to convert to Islam and assaulted her physically. He also states that religious elders were sent to the house to talk to her and they attempted to torture her. He entered the house and broke down the door to rescue her and took her to the police station to lodge a complaint. He then took her to her mother's house. He said he fears she "cannot be seen alive" should she return to Malaysia. He attached a copy of his identity card to his declaration.
43. There was second a translation of the statement by the Malaysian Indian Congress, Cawangan dated [in] May 2008. It has a subheading Domestic problem (Violence against women) and states that a complaint was received by the Malaysian Indian Congress, that she, the applicant, had been tortured and locked in a room by her partner, and that he had perpetrated a number of acts of cruelty on her and taken her money and jewellery. It also states that her de facto as a gambler converted to Islam for money and is trying to force her to convert to that religion and subjected her to torture. She submitted a complaint and sought assistance. The letter states "after an extensive investigation, we accept her complaint. We are ready to offer her whatever help we can".

FINDINGS AND REASONS

44. The Tribunal accepts the applicant is a Tamil Hindu born in Malaysia. The Tribunal noted the applicant's evidence and accepts that she was in relationship with a man who became a Muslim. This is also supported by the two letters received by the Tribunal post hearing (T f44 and 47).
45. The Tribunal gave weight to the corroborative evidence of [Mr A], and that of the Malaysian Indian Congress.
46. The applicant, who is a female Tamil Hindu from Malaysia fears that she will be harmed – possibly even killed – on return to Malaysia by this man, her de facto partner who she claims has abused her since he converted to Islam and he has tried to force her to convert to Islam. She also fears action from the local Islamic Council who have previously threatened her and detained her.

47. The Tribunal noted the claim by the applicant that the a group from the Islamic Council came to the house and asked her to convert to Islam and made her go to their [town deleted s431(2)] Office to record her objection and they kept her in “in house” arrest for 5 days.
48. There is some confusion in this case as to whether Sharia law applies. Independent country information clearly states that Sharia law (or what the applicant has called Syariah law), does not apply to a person who is not a Muslim. Sharia laws are administered by state authorities through Islamic courts and bind all Muslims only. Non Muslim women are subject to civil secular law. (US State Reports 2008 and Religious Report 2008, as included in the Decision Record given to the applicant, D f 50). However, the Tribunal accepts that the Islamic group regarded her as married to her partner in an Islamic sense and therefore regarded her as subject to Sharia law. The issue is not clear and past history in Malaysia, where there is contention as to whether Sharia or civil law applied in a given situation suggests that the civil jurisdiction is wary of interfering in areas claimed by Sharia law.
49. While the applicant has not mentioned marriage, the issue of marriage in Malaysia is one that affects Muslims in Malaysia who are covered by the Sharia law, or what the applicant has called Syariah law. The Sharia law prohibits the marriage between Muslims and any person who is not a Muslim. As the USA State Department Report on Religion in Malaysia, in 2007 comments: “Pursuant to Shari'a family laws in force throughout the country, non-Muslims must convert to Islam upon marrying a Muslim.” This is a law of general application. This is not a law that intends to persecute persons who are of a specific religion, or their religious beliefs, it is not a discrimination of the kind that is persecution for a Convention reasons. Non Muslims may marry in Malaysia, this is covered under civil law. Considering the case of *VCAD v MIMI [2004] FMCA 1005* there is a persecutory intent in the desire of the de facto to covert the applicant to Islam.
50. While the applicant did not use the term domestic violence, she spoke of violence perpetrated against her in order to force her to convert, the Tribunal equates her situation as one in which there is domestic violence.
51. Women suffering domestic violence in such situations may nevertheless, depending on the circumstances, come within the scope of the Convention: *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1. Women are clearly capable of constituting a particular social group for the purposes of *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387 on the basis that as a group they are capable of meeting the prerequisites identified in that case by Gleeson CJ and Gummow and Kirby JJ at [36] namely that:
the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large.
52. For domestic violence to constitute Convention persecution it is not necessary for the perpetrator of the violence to be motivated by a Convention reason. As Gleeson CJ explained in *Khawar*,:
Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that

the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.

53. The Tribunal has therefore considered whether the harm the applicant claims to have experienced at the hands of her partner may have constituted Convention persecution in the sense described by Gleeson CJ in *Khawar*.
54. In this case the Tribunal finds that the domestic violence that the applicant has been subjected to by her de facto partner is attributable to his desire for her to convert to Islam. The Tribunal found the applicant a truthful witness. In addition her evidence was supported by that of a neighbour, and also that of the local branch of the Malaysian Indian Congress who investigated the matter and accepted the claims of the visa applicant.
55. Taking into account the evidence before it as well as relevant country information, the Tribunal finds that the applicant as a de facto female partner of a person who has converted to Islam can be considered to be a group set apart from the rest of society, and so constitutes a particular social group in the Convention sense. The Tribunal finds that the applicant is a member of this particular social group and that the applicant's membership of this particular social group is the essential and significant reason for the harm feared.
56. In the *Khawar* decision, the High Court held that the 'serious harm' involved in persecution could be inflicted by persons who were not state agents (at 576-583 per Gleeson CJ). The Court found that failure to offer protection from harm itself satisfies the Refugees Convention. Therefore, once a claim meets the threshold of serious harm – as the Tribunal has found in this case – the relevant consideration is whether effective state protection is available for the sexual and religious based violence suffered by the applicant. As demonstrated in *Khawar*, it is not necessary that the harm is inflicted by the state, rather the emphasis is on the nexus between the harm suffered and the state's ability or inability to protect the applicant.
57. The Tribunal finds that the applicant's lack of standing as a de facto, and the uncertainty as to whether civil law or Shariah law applied means that state protection is unlikely to be forthcoming. There is also the element of the de facto's close links with the police which may influence them not to act. Furthermore the evidence given by the applicant of her lodging four protests to the police about her situation and a lack of any action from any of these complaints supports her concern. The evidence of her neighbour also supports her claim that she did complain to the police and yet they did not act on her complaints. Country information suggests that there is still elements of police corruption in Malaysia.
58. The issue of the adequacy of state protection was summarised in *Svecs v MIMA* (1999) FCA 1507 where Hely J remarked at 26 that:
"The issue is not whether the authorities can guarantee that the applicants will not suffer harm for a convention reason, but whether in the language of the *Full Court in A, B & C v Minister for Immigration & Multicultural Affairs* at parag 42, (the relevant Country) has "effective judicial and law enforcement agencies, is governed by the rule of law and has an infrastructure of laws designed to protect its nationals against harm of the sort said to be feared" by the applicants."
There is also the case *MIMA v Respondent S152/2003*, of a reasonable level of state protection.

59. A further consideration for the Tribunal is whether the applicant would be reasonably able to relocate to another part of Malaysia where she would be safe from harm from her de facto partner. In this regard, the applicant gave evidence that she believed her de facto would have the motivation and means to locate her if she returned to Malaysia and indicated that he had visited her mother's house regularly to try and ascertain her whereabouts. As a person with police connections, as a drug informer, employed by the police, he would have access to information as to her whereabouts. Given the religious conversion by the de facto, she fears too his links with the Islamic Association, and the keenness of that group to pursue her. The applicant as a Hindu Tamil, and a person without any educational qualifications would have difficulty obtaining employment, and her life has been associated within a home area where her mother lives as do her close friends. In view of the applicant's lack of education and work experience, her lack of financial capital and lack of ability to access an independent income it would not be reasonable, in the Tribunal's view, for the applicant to relocate.
60. In considering all the circumstances of this case, the Tribunal finds that the applicant has a well founded fear and that there is a real chance that the applicant would face persecution for a Convention reason if she were to return to Malaysia now or in the reasonably foreseeable future.

CONCLUSIONS

61. 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

62. 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. prrt44