

**1100595 [2011] RRTA 236 (21 March 2011)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1100595

**DIAC REFERENCE(S):** CLF2010/149524

**COUNTRY OF REFERENCE:** Thailand

**TRIBUNAL MEMBER:** Belinda Wells

**DATE:** 21 March 2011

**PLACE OF DECISION:** Adelaide

**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 Thailand, arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information would identify the applicant] September 2010 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] November 2010. The delegate decided to refuse to grant the visa [in] January 2011 and notified the applicant of the decision and her review rights by letter [on the same date].
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] January 2011 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 and Tribunal's files relating to the applicant. The Tribunal also has had regard to other material available to it from a range of sources.
20. The applicant lodged a protection visa application [in] November 2010. In her application she states that she is a [age deleted] Thai citizen, and that she has a baby daughter named [Child A] who was born in Thailand on [date deleted] and is an Australian citizen by descent. She states that she became widowed [in] April 2010. She states that she has a Thai passport, and that she entered Australia [in] September 2010 as the holder of a tourist visa which was valid until [a date in] March 2011.
21. In her application the applicant states that she left Thailand in order to stay with the family of her deceased partner, as she feared for her daughter's safety, and in turn her own safety when protecting her daughter from attacks similar to the attack on her daughter's father [Mr B]. She states that her daughter [Child A] is an Australian citizen, as was her daughter's father [Mr B], and she therefore fears that the same fate will befall her daughter, and that she will also be attacked when acting to protect her daughter.
22. The applicant states in her application that she believes that the people that attacked her partner [Mr B] may also attack their daughter, and that she also believes that white people are targets in Thailand. She states that the reason that her daughter would be attacked is because she is white in colour and also an Australian citizen, and that as [Child A]'s mother she would be attacked because she was protecting her daughter.
23. The applicant states in her application that the Thai police would be unable to protect her and her daughter because they do not have sufficient resources to be with them 24 hours per day, and because they have not been able to locate two of the three men who attacked [Mr B].
24. The applicant provided various documents in support of her application, including the following:
  - Thai passport extract for the applicant;
  - Birth certificate of the applicant;
  - Birth certificate of [Mr B];
  - Birth certificate of [Child A], born in Thailand on [date deleted] to the applicant and [Mr B];
  - Australian citizenship certificate for [Child A], born on [date deleted];
  - Memorandum from Deputy Superintendent of [Location 1] Provincial Police Station, Surin province, Thailand to Foreign Affairs Division Police Commander dated [in] April 2010 reporting that [Mr B] had died [in] April 2010 at [hospital deleted];

- Report from Superintendent of [Location 1] Provincial Police Station dated [in] April 2010, stating that:

*“(On) March [date], 2010 at about 22.10 hours [Mr B] .. was hacked by three suspects, who conspired to use machetes to hack him on the head and arms and caused several wounds. ...*

*Later on investigators found a group of suspects who committed the crime, which on April [date], 2010 they arrested one suspect, [age], ... The suspect .. confessed that on the day and time of the incident he conspired with the fleeing suspects and used machetes to hack the injured person. He was charged with “conspiracy to kill intentionally and carrying a weapon (machete) to the city, village and public places without necessity or urgency, not warranted by the circumstances”.*

*The two other suspects were under investigation, which their names and domiciles were identified and to be arrested later.”*

- Photographs of the injuries to [Mr B]’s head;
- Certificate of Death from [Location 1] district registration office stating that [Mr B], who is of Australian nationality, died [in] April 2010;
- Autopsy report on the death of [Mr B];
- Report from the Australian Embassy in Bangkok sent by the Department of Foreign Affairs and Trade (“DFAT”) to [Mr C] by email [in] May 2010, providing information about various issues relating to [Mr B]’s death, including the following:

*“[Officer] confirmed that police are continuing to investigate the circumstances of [Mr B]’s assault and death. Three Thai youth males suspected of assaulting [Mr B] have been charged under the Thai Penal Code. As reported previously, one of the youths is now in police custody and is being detained at the [location] Juvenile Detention Centre.”*

- Report from the Australian Embassy in Bangkok sent by DFAT to [Mr C] by email [in] October 2010, providing information about the police investigation into the attack on [Mr B]’s death, including the following:

*“[Officer] informed post that the police are continuing their investigation into the whereabouts of two of the suspected assailants.”*

- Travel claim investigation final report dated [in] April 2010 conducted by [company deleted] addressed to [company deleted], providing a description of various enquiries made by the investigator and conclusions drawn from these inquiries, including the following:

*“According to the Police in [Location 1], the insured was the victim of a random attack on the night of [day and date]. The attack occurred as [Mr B] and his fiancé were walking home along ... a major road leading from [Location 1] to [Location 2] ... The insured suffered severe lacerations to his head, arm and hand during the assault.*

...

## ANALYSING THE CLAIM

*The incident in which [Mr B] was attacked appeared to be unprovoked and a random attack, one of several that night according to the Police. ...”*

- “[Title]”, [Newspaper deleted] website, [date deleted] April 2010;
  - Letter from the Department dated [in] August 2010 acknowledging that the applicant has lodged an application for a Parent subclass 143 (Contributory Parent – Migrant) visa; and
  - Decision by a delegate dated [in] October 2010 waiving the 8503 condition (no further stay) that was imposed on the applicant’s tourist visa.
25. The applicant was interviewed by a Departmental officer [in] January 2011.

### **Delegate’s decision**

26. [In] January 2011 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.
27. The delegate said in her decision that the applicant had made no claims that she fears being harmed in Thailand because of her race, religion, nationality or political opinion. The delegate said that there was no evidence before her that the applicant fears harm for these reasons. The delegate decided that the applicant’s claim to fear harm in retaliation for her witnessing a criminal act was clearly not Convention related.
28. The delegate also considered the applicant’s claim that her daughter is at risk of being attacked and being trafficked because of her race, and that she will experience persecution as the mother of a foreign child. The delegate considered that the applicant’s family unit (comprising her and her daughter) would constitute a particular social group for the purposes of the Refugees Convention, but that in view of the country information on northern and rural Thailand the applicant’s claim that she is likely to experience persecution protecting her daughter from racial attack was not well-founded. The delegate stated that she had not found any country information that indicated that racial violence in rural or northern parts of Thailand - as opposed to violence for criminal and financial motives – is a widespread problem.
29. The delegate was not satisfied that state protection was withheld from the applicant for a Convention reason.
30. The following passage appears in the delegate’s decision:

*“While I have found that the applicant is not likely to suffer persecution on the basis of a Convention reason, I note that the applicant’s claims do raise serious concern for her personal safety if she returns to Thailand and accept that she has a genuine fear of returning. I have found no reason to doubt the applicant’s credibility in this case. She has provided substantial documentation to evidence her claims in relation to her partner’s death and subsequent police investigations and in addition to this was able to provide direct, consistent and plausible evidence regarding her claims when interviewed.”*

## **The Review**

31. [In] January 2011 the applicant applied to the Tribunal for review of the delegate's decision. The applicant was represented in relation to the review by her registered migration agent.
32. [In] February 2011 the Tribunal received a submission from the applicant's representative, in which her representative states that given the complexity and compelling circumstances that exist in the case she asks for the Tribunal's support in the applicant's next step towards Ministerial Intervention under section 351 of the Migration Act, and makes the following points:
  - If the applicant was forced to return to Thailand with her daughter she will experience difficulties as a sole parent, and she and [Child A] will suffer without the physical and psychological support of her former partner [Mr B]'s parents.
  - The applicant's child [Child A], who is an Australian citizen, would be subject to the issues faced by children of multiple nationalities in Thailand. According to a UNICEF report, in Thailand children face various problems including trafficking of children, exclusion from education and other forms of exploitation. The applicant is concerned for her daughter's security if she has to return to Thailand.
  - [Mr B]'s parents, [name deleted] and [Mr C], are devastated by the death of their son [Mr B] in Thailand last year, and they would like the applicant to be given the opportunity to remain in Australia where they can assist both the applicant and their grandchild [Child A]. For [Mr B]'s parents, their grandchild [Child A] is a daily reminder of their son.
  - [Mr B] was only [age deleted] at the time of his death. Prior to his death he was planning to raise his family in Australia. His family has lost a son and is now in danger of also losing his partner and his child.
  - The applicant and the family of her deceased partner [Mr B] have considered various visa options to enable the applicant and her Australian citizen daughter to live in Australia, including lodging and subsequently withdrawing a parent visa application because the second visa application charge was too high, but the Department has been unable to determine a more appropriate type of visa for the applicant than a protection visa.
  - The applicant and [Mr B]'s parents will be required to travel to Thailand throughout the next three months. The applicant therefore requests the Tribunal to refer this matter to the Minister for Immigration for intervention as a matter of priority so as to allow the family members to resume their lives.
33. [In] February 2011 the Tribunal wrote to the applicant. The Tribunal referred to the submission from the applicant's representative and requested the applicant to advise the Tribunal whether she consented to the Tribunal deciding the review without a hearing.
34. [On the same date] the applicant's representative advised the Tribunal in writing that the applicant consented to the Tribunal making a decision in the matter without a hearing.

## **Evidence from other sources**

35. Current travel advice from the Department of Foreign Affairs and Trade warns that "[s]exual assault, food and drink spiking, assault and robbery against foreigners occurs in Thailand". Petty

theft is a common occurrence and robberies by drivers of unauthorised taxis have occurred.<sup>1</sup> The US Department of State (USDOS) advises that “there has been a recent upsurge in violent crime against tourists, including the murder of several independent travelers, on the southern islands of Phuket and Koh Samui”.<sup>2</sup>

36. The Tribunal did not locate any reports of babies or young children experiencing harm or trafficking because of their mixed parentage or Australian citizenship (or citizenship of other Western countries).
37. Sources indicate that the trafficking of children in Thailand continues to be a challenge for the Thai government. In relation to sex trafficking, the precise numbers of under-age sex workers in Thailand is not known; however, government agencies and NGOs alike agree that, at a minimum, it is in the tens of thousands. The US Office of the National Commission of Women’s Affairs estimates that in 2008 there were “between 22,500 and 40,000 Thai nationals below age 18 engaged in prostitution”.<sup>3</sup> In 2007, however, the Thai government, academics and NGOs estimated that the number was probably closer to 60,000.<sup>4</sup> One source makes the claim that the number could be as high as 800,000.<sup>5</sup>
38. Sources indicate a significant proportion of sex workers in Thailand are unwilling participants, forced into prostitution at an early age by poverty and/or their parents rather than by means of abduction. The US Department of State states that many girls “forced into prostitution” are from Thailand’s border regions and poor areas in the country’s north and north-east.<sup>6</sup> In a 2003 interview a United Nations spokesperson stated that in relation to trafficking Radhika Coomaraswamy, the United Nation’s special representative of the Secretary General on violence against women, says:

*”[t]he tragedy of trafficking is that the actual recruitment is often by family members, friends . . . then they are sold to brothels run by organized crime...the actual recruitment procedure is not, as I said, abduction. It’s by trust.”*<sup>7</sup>
39. The Tribunal did not locate any reports of mothers of half-white Australian babies (or half-western babies more generally) experiencing harm because of the need to protect their children from violence or trafficking.

### **Thai women who marry western men**

40. Sources indicate that young Thai women who marry western men, or ‘mia farang’, may experience moral criticism and stigmatisation. In 2004, a PhD dissertation observed that the number of interracial marriages involving western men and Thai women had increased, particularly in the northeast region of Thailand. This phenomenon has stirred up debate across

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<sup>1</sup> Department of Foreign Affairs and Trade, 2011. “Travel Advice - Thailand”, smartraveller website – <http://www.smartraveller.gov.au/zw-cgi/view/Advice/Thailand> – Accessed 4 March 2011.

<sup>2</sup> US Department of State 2010. *Thailand Country Specific Information*, 16 September [http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1040.html#crime](http://travel.state.gov/travel/cis_pa_tw/cis/cis_1040.html#crime) – Accessed 8 March 2011.

<sup>3</sup> US Department of Labor 2009, *2008 Findings on the Worst Forms of Child Labor – Thailand*, UNHCR Refworld, 10 September <http://www.unhcr.org/refworld/docid/4aba3ebe37.html> – Accessed 6 January 2011.

<sup>4</sup> US Department of State 2010, *2009 Country Reports on Human Rights Practices – Thailand*, 11 March, Sec 6.

<sup>5</sup> Pusurinkham, S. (undated), ‘Child Prostitution in Thailand’, A Globe of Witnesses website <http://www.thewitness.org/agw/pusurinkham.121901.html> – Accessed 15 January 2010.

<sup>6</sup> US Department of State 2009, *Country Reports on Human Rights Practices for 2008 – Thailand*, 25 Feb, S 5.

<sup>7</sup> Mintier, T. 2003, “Thailand tackles sexual slavery”, *CNN*, 25 September <http://edition.cnn.com/2003/WORLD/asiapcf/southeast/09/25/thai.sex.slavery/> – Accessed 15 January 2010.



the country. In 2003-2004, up to 15,000 women from Isan provinces were married to or in relationships with foreign men. These men were mainly from Western European countries and the U.S.<sup>8</sup> According to the author:

*While subtle and sporadic in the rural community, negative comments about the Phua Farang phenomenon are prevalent in the urban settings of Udonthani, as well as in the national media with headquarters in metropolitan Bangkok. For a significant part of the general public, certain academics, and some central and provincial government representatives, the Phua Farang phenomenon in rural Isan signifies a moral problem caused by “rampaging materialism/consumerism” which threatens to degrade the “Thai traditional culture.”<sup>9</sup>*

41. A 2004 article published in *The Nation* similarly states that references in the media towards mia farang were both “derogatory and offensive”.<sup>10</sup> Part of the stigma of being married to a foreigner is a commonly made assumption that the wife met her future husband through the sex industry. Marriage to foreigners (farangs), however, is quite common in Thailand, especially in the Eastern Isaan region; one 2005 article reported “that in some northeastern Thai villages, it is reported that as many as one-third of families have female members who have western husbands.”<sup>11</sup> Economically less developed regions such as the Isan have begun to recognise the economic benefits of women marrying foreigners. A 2004 *BBC News* report states that annual remittances to the Isaan were then worth \$35 million annually.<sup>12</sup> Such benefits have also been reported in the Thai press.<sup>13</sup> Mia farangs may face the expectation that they should financially support the extended family in Thailand.<sup>14</sup>
42. A recent opinion piece in the *Bangkok Post* states that many Thais still harbour disdain towards interracial relationships involving western men and Thai women. The piece notes that an informal survey of the *Bangkok Post*'s discussion forums indicate that negative attitudes towards Thailand are also present amongst some in western expatriate communities.<sup>15</sup> The ‘Absolutely Bangkok’ website, on the other hand, stated in 2010 that some stigma towards women in these relationships had been removed, partly due to the women’s upward economic mobility.<sup>16</sup>

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<sup>8</sup>Sunanta, S. 2009. *Global Wife, Local Daughter: Gender, Family, and Nation in Transnational Marriages in Northeast Thailand*, PhD Dissertation, Faculty of Graduate Studies (Women’s and Gender Studies) University of British Columbia, March, p. 1, Accessed 3 March 2011:

[https://circle.ubc.ca/bitstream/handle/2429/6267/ubc\\_2009\\_spring\\_sunanta\\_sirijit.pdf?sequence=1](https://circle.ubc.ca/bitstream/handle/2429/6267/ubc_2009_spring_sunanta_sirijit.pdf?sequence=1) .

<sup>9</sup> Sunanta, S. 2009. *Global Wife, Local Daughter: Gender, Family, and Nation in Transnational Marriages in Northeast Thailand*, PhD Dissertation, Faculty of Graduate Studies (Women’s and Gender Studies) University of British Columbia, March, p. 136, Accessed 3 March 2011:

[https://circle.ubc.ca/bitstream/handle/2429/6267/ubc\\_2009\\_spring\\_sunanta\\_sirijit.pdf?sequence=1](https://circle.ubc.ca/bitstream/handle/2429/6267/ubc_2009_spring_sunanta_sirijit.pdf?sequence=1).

<sup>10</sup>Klausner, W.J. 2004 “Valuing cross-cultural marriage”, Thailand Monitor website, source: *The Nation*, 24 June [http://www.thaiworld.org/en/thailand\\_monitor/answer.php?question\\_id=60](http://www.thaiworld.org/en/thailand_monitor/answer.php?question_id=60) – Accessed 14 April 2010.

<sup>11</sup> “Phanrayaa-Farang: Take Their Roots with Them” 2005, Thailand Monitor website, source: *Bangkok Post*, 15 May [http://www.thaiworld.org/en/thailand\\_monitor/answer.php?question\\_id=148](http://www.thaiworld.org/en/thailand_monitor/answer.php?question_id=148) – Accessed 15 April 2010.

<sup>12</sup> “Thailand’s ‘Swiss village’” 2004, *BBC News*, 20 July <http://news.bbc.co.uk/2/hi/asia-pacific/3907581.stm> – Accessed 15 April 2010.

<sup>13</sup> “‘MIA FARANG’: When Harry weds Somsri, business blooms” 2004, *The Nation*, 14 June

<http://www.nationmultimedia.com/search/read.php?newsid=100579&keyword=nation> ,Accessed 14 April 2011.

<sup>14</sup> Suksomboon, P. 2007, “Remittances and social remittances: Their impact on cross-cultural marriage and social transformation”, IIAS Newsletter # 45, Autumn, p.6 [http://www.iias.nl/files/IIAS\\_NL45\\_06.pdf](http://www.iias.nl/files/IIAS_NL45_06.pdf) – Accessed 15 April 2010.

<sup>15</sup> “Dorothy You’re not in Kansas Anymore” 2011, *Bangkok Post*, 21 January

<http://www.bangkokpost.com/opinion/opinion/217666/dorothy-you-re-not-in-kansas-any-more> .

<sup>16</sup> “Phua Farang: Demanding Daughter Duty” 2010, Absolutely Bangkok website, 8 January <http://absolutelybangkok.com/phua-farang-demanding-daughter-duty/> – Accessed 3 March 2011.

## **State Protection**

43. No reports specifically relating to authorities being willing, or unwilling, to protect women and their children from harm inflicted for reasons of race or nationality were located.

## **FINDINGS AND REASONS**

44. The applicant claims that if she returns to Thailand with her daughter she may be seriously harmed when she is acting to protect her daughter from persons wanting to kidnap or attack her daughter because of her daughter's nationality (as an Australian citizen) and because her daughter is white in colour and is therefore from a particular ethnic or racial background.
45. The Tribunal finds that the applicant has not claimed that if she returns to Thailand there is real chance that she will be seriously harmed by attackers because of her race, religion, nationality or political opinion, or because the attackers may impute her daughter's race and nationality to her.
46. The Tribunal finds, on the basis of the country information referred to above and the information in the Departmental and Tribunal files, that there is no evidence that if the applicant returned to Thailand she may be seriously harmed by attackers because of her race, religion, nationality or political opinion, or because the attackers may impute her daughter's race and nationality to her.
47. Accordingly, the Tribunal is not satisfied that if the applicant returned to Thailand there is a real chance that she may be seriously harmed by attackers because of her race, religion, nationality or political opinion, or because attackers may impute her daughter's race and nationality to her.
48. The applicant has also claimed that if she returns to Thailand she may be seriously harmed by those who attacked [Mr B] because she witnessed the attack. The Tribunal finds that any harm inflicted for this reason would not be inflicted for a Convention reason.

## **Particular social group**

49. The Tribunal also considered whether if the applicant returned to a Thailand there is a real chance that she would be seriously harmed because of her membership of the particular social group '[Child A]'s family unit'.
50. The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A v MIEA* (1997) 190 CLR 225 ("*Applicant A's case*") and also in *Applicant S v MIMA* (2004) 217 CLR 387 ("*Applicant S*"). In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, 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. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...
51. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group

and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.

52. It is well established in Australian law that a family is capable of constituting a particular social group within the meaning of the Refugees Convention.
53. The Tribunal finds that the group '[Child A]'s family unit' (comprised of [Child A] and her parents, [Mr B] and the applicant) is a particular social group within the meaning of the Convention, and that the applicant is a member of the group.
54. Section 91S of the Migration Act provides that the following matters must be disregarded in determining whether a person has a well-founded fear of being persecuted for reasons of membership of a particular social group that consists of the person's family:
  - a) any fear of persecution, or any persecution, that any other family member has experienced, where the fear or persecution is not for one of the Convention reasons; and
  - b) any fear of persecution, or any persecution, that the applicant or any other family member has experienced, where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in (a) above had never existed.
55. As a result of s 91S, a person who fears persecution because he or she is a relative of a person targeted for a non-Convention reason does not fall within the grounds for persecution covered in the Convention definition.
56. The Tribunal considered whether the other members of the particular social group – namely, [Mr B], and [Child A] – have been persecuted, or fear persecution, for a Convention reason, or for a non-Convention reason.

### **Reasons why [Mr B] may have been attacked**

57. The Tribunal considered the evidence about the reasons for the attack on [Mr B]. In her application for a protection visa the applicant stated that [Mr B] was attacked because he was white and an Australian national. The delegate states in her decision that during her interview the applicant acknowledged that in big cities in Thailand foreigners such as tourists and business people may be subject to attack because of their perceived wealth rather than because of their race, but the applicant said that in rural areas, where the applicant lives and where her partner was attacked, the motivation is purely racial.
58. The Tribunal considered the documentary information about the attack that the applicant had provided to the Department, including the police reports dated [in] April 2010, and [in] December 2010, the [company deleted] insurance report, and the DFAT reports on the progress of the police investigation into the attack. The Tribunal notes that in the police report dated [in] April 2010, which the applicant provided to the Department, the Acting Superintendent reports that [Mr B] was "killed without a known motive at [hospital]". The Tribunal finds that it is unclear whether the author of this report was referring to the motive of [Mr B]'s attackers, or the reasons for his subsequent death at [hospital deleted]. The article "[title]" speculates that the attack on [Mr B] "might have been a failed robbery". The other documents do not refer to a motive for the attack.

59. The Tribunal finds, on the basis of all of the documentary evidence provided by the applicant to the Department, that there is no evidence that [Mr B] was attacked because of his race or nationality or for any other Convention reason.
60. The Tribunal undertook extensive research to locate any country information about whether westerners and foreigners are at risk of being attacked or otherwise seriously harmed in the north-east of Thailand, and in Thailand generally, because of their race or nationality. The Tribunal was unable to locate any such information.
61. The Tribunal located recent DFAT travel advice which warns travellers of the types of criminal offences committed against foreigners in Thailand, and recent US Department of State information which warns of a recent upsurge in violent crime against tourists. This information is set out above. However neither source indicates that in Thailand criminal activities against foreigners are motivated by race or nationality, as opposed to the motivation of financial gain.
62. The Tribunal finds, on the basis of the documentary information and the country information, that there is no evidence to indicate that [Mr B] was persecuted because of his race or his nationality, or for any other Convention reason.

#### **Reasons why [Child A] may fear persecution**

63. Secondly, the Tribunal considered the reasons why [Child A] may fear persecution. The applicant stated in her application that if she returned to Thailand with her daughter [Child A, she] may be attacked because she is white in colour and because she is an Australian citizen. The applicant also claimed that [Child A] may be trafficked because of her race.
64. The Tribunal undertook extensive research to locate any country information about whether babies or young children have experienced, or may experience, physical harm or trafficking in the north-east region of Thailand, or in Thailand generally, because of their race or mixed parentage, or because of their Australian citizenship. The Tribunal was unable to locate any such information.
65. The Tribunal finds, on the basis of the country information set out above, that whilst trafficking of children in Thailand continues to be prevalent, the actual recruitment of girls is generally by family members and friends, rather than by abduction.
66. The Tribunal is not satisfied, on the basis of the country information, that if [Child A] returned to Thailand there is a real risk that she would be attacked for a Convention reason, or that she would be trafficked.
67. The Tribunal therefore finds that the applicant is a member of the particular social group '[Child A]'s family unit', but that the other members of this group have been persecuted or fear persecution for reasons which are not reasons mentioned in Article 1A(2) of the Refugees Convention. The Tribunal therefore finds that the underlying reasons are reasons which are not mentioned in Art 1A(2) of the Convention.
68. Accordingly, the Tribunal finds that the effect of s 91S of the Migration Act is that the Tribunal must disregard the persecution and fears of persecution experienced by the applicant's family members, as the persecution and fear of persecution are not for one of the Convention reasons, and that it is reasonable to conclude that the applicant's fear of persecution would not exist if the family members' persecution and fear of persecution did not exist. As a result, the Tribunal must

disregard any fear of persecution by the applicant on this basis, and so finds that the applicant does not have a well-founded fear of being persecuted for reasons of membership of the particular social group ‘[Child A]’s family unit’.

#### **‘Thai women who have married foreigners’**

69. The Tribunal also considered whether if the applicant returned to Thailand there is a real chance that she would be seriously harmed on the basis of her membership of the particular social group ‘Thai women who have married foreigners’. The country information set out above indicates that such a group share a common characteristic which is recognised as distinguishing them from society at large, as reports indicate that the group of ‘Thai women who have married foreigners’ (or ‘mia farang’) is widely discussed across the country, including in government institutions and in the media.
70. The Tribunal considered, on the basis of the documentary evidence, including the applicant’s reference to her “partner” [Mr B] in her visa application, that the applicant may be regarded in Thailand as having effectively married [Mr B] and may therefore be a member of the particular social group ‘Thai women who have married foreigners’.
71. The Tribunal finds, on the basis of the country information set out above, that whilst young Thai women who marry western men may attract derogatory comments, particularly in urban and government settings and in the national media, marriage to foreigners is quite common in Thailand and economically less developed regions have begun to recognise the economic benefits of Thai women marrying foreigners. The Tribunal finds that whilst it is possible that if the applicant returns to Thailand she may experience some derogatory comments and moral criticism because of her marriage to [Mr B], there is not a real chance that she would experience harm of sufficient severity to constitute ‘serious harm’ for this reason.
72. The Tribunal therefore finds, on the basis of the country information set out above, that if the applicant returns to Thailand there is not a real chance that she will be seriously harmed on the basis of any membership of the particular social group ‘Thai women who have married foreigners’.

#### **Feared Persecution by Non-State agents**

73. The applicant’s evidence at hearing indicated that the persons whom she feared would seriously harm her if she returned to Thailand are non-State agents. The Tribunal has therefore focused its attention on this potential source of persecution.
74. In *MIMA v Khawar* (2002) 210 CLR 1 (“*Kharwar*”) Gleeson CJ held that:

*“Persecution may... result from the combined effect of the conduct of private individuals and the state or its agents; and a relevant form of state conduct may be tolerance or condonation of the inflicting of serious harm in circumstances where the state has a duty to provide protection against such harm”*: at [30].

....

*Where the 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.”*

75. The Tribunal has found, for the reasons set out above, that the serious harm that the applicant fears from individuals would not be motivated by Convention reasons.
76. The Tribunal considered whether the applicant may fear persecution on the basis that the Thai state would, for a Convention reason, tolerate or condone violence by individuals against the applicant. The Tribunal finds that the applicant did not claim that this would be the case, and there was no evidence that this may be the case. Accordingly, the Tribunal finds that it is not satisfied that the Thai state would, for a Convention reason, tolerate or condone violence by individuals against the applicant.
77. In view of the findings made above, the Tribunal is not satisfied that if the applicant returned to Thailand there is a real chance that she would be persecuted for a Convention reason.

### **Ministerial Intervention pursuant to s 417 of the Act**

78. The Tribunal considers that for the following reasons it may be appropriate for the Minister to consider intervening in this matter on public interest grounds pursuant to s 417 of the Act:
  - [In] March 2010 the applicant’s partner [Mr B] was attacked by three Thai men whilst in north east Thailand with the applicant. [In] April 2010 he died of his injuries.
  - [Mr B] was an Australian citizen. After his death the applicant gave birth to their child, [Child A], who is an Australian citizen by descent.
  - The delegate accepted, after interviewing the applicant, that the applicant has a genuine fear of returning to Thailand with her daughter.
  - The delegate did not find any reason to doubt the applicant’s credibility. [In] October 2010 a Departmental officer recommended that there were compelling and compassionate circumstances justifying the waiver of the 8503 condition placed on the applicant’s tourist visa, and a delegate agreed to that recommendation and approved the waiver.
  - The Tribunal finds, on the basis of the documentary evidence provided to the Department, that the applicant witnessed the attack on [Mr B], and that two of the three men who attacked the applicant’s partner have not been located by the Thai police and are still at large. If the applicant returned to Thailand to live, she would do so as a sole parent, and with a child of mixed race and multiple nationalities.
  - [Mr B]’s parents, [name deleted] and [Mr C], are devastated by their son’s death. They have been supporting the applicant and her daughter in Australia, who are their daughter-in-law and grandchild. According to the submission provided by the applicant’s representative, [Mr B]’s parents have lost a son, and they would like their daughter-in-law and grandchild to remain in Australia where they can directly assist them.
  - [Child A] is an Australian citizen, and she would have a better life if she and the applicant were able to remain in Australia, with the support of her paternal grandparents.

79. In view of the applicant's past experiences and the matters summarised above, it may be appropriate for the Minister to consider intervening in this matter on public interest grounds pursuant to s 417 of the Act. That is, of course, a matter entirely at the Minister's discretion.

### **CONCLUSIONS**

80. For the reasons set out above, 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**

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