1317626 [2014] RRTA 321 (24 April 2014)

DECISION RECORD

RRT CASE NUMBER:	1317626
COUNTRY OF REFERENCE:	Republic of Korea
TRIBUNAL MEMBER:	Bruce Henry
DATE:	24 April 2014
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

2. The applicant, who claims to be a citizen of the Republic of Korea, applied to the Department of Immigration for the visa [in] July 2013 and the delegate refused to grant the visa [in] November 2013.

3. The applicant appeared before the Tribunal [in] April 2014 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.

4. The applicant was represented in relation to the review by his registered migration agent, who did not, however, appear at the hearing.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

6. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

7. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

8. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

9. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

10. The Tribunal has before it the Department's file and the Tribunal'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.

11. Documents on the Departmental file establish that the applicant was born [in] the Republic of Korea and is a citizen of that country. He first arrived in Australia [in] June 2006 on a subclass 417 working holiday visa, and departed Australia [in] February 2008. He returned to Australia on electronic visitor visas in March 2008 for three months, in August 2008 for six months, and in August 2009 for another six months. He left Australia for [another country] in February 2010, but returned again in November 2010 with a further electronic visitor visa which ceased [in] February 2011. He has been in Australia since that time, and applied for a protection visa [in] July 2013.

12. The applicant provided the following information in his protection visa application:

> *I happened to know in 2006 that there was a program named Australia's working holiday and came to this country soon after.*
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> *Since I only finished up to [stated level] of the education, I have been an object to insult and treat badly for Korean society regards persons like me as a loser. Perhaps Korea is one of the most discriminatory countries in the world that evaluate people from physical look, money, education, family background, where they live, etc. No matter how hard I work, employers do not pay much but starvation wages.*
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> *People do not employ me even if I consent to work for such small amount of wages for they have plenty of foreign workers who are willing to work for one third of the normal wage level. Those workers come from China, Philippines, Indonesia, Vietnam, Cambodia, Laos, Berma & Africans. So while I am ill-treated by the community, they don't employ me for I am Korean. For your information almost all factories in Korea that produce or manufacture anything are occupied by foreign workers in all labourer's positions. All I can do is waiting to be starved to death or living in another country as a shadow of the community and I will be subject to mistreatment and bullying.*
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> *My mother back in Korea had a big operation in 2000 for brain bleeding and can't move freely. 13 years later, she has to go to hospital for regular checking by doctors every week. Buying medication for her cost fortune and my family suffers from poverty. My father works as [Tradesperson 1] but there are not many jobs left for him while he is getting older. I can do nothing much to improve the situation. In the meantime I have a [Country 2] girl friend that I have lived with for 2 years. Since we love each other dearly, we prepare for marriage but my senior relatives are so conservative that they hate [Country 2] as hell. Under the circumstances marriage is unimaginable. Since the situation is as such, it is hard for us to cohabit in Korea and the situation is visa versa in [Country 2]. I can't do anything to live on in [Country 2].*
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> *Since I don't have the basic specification to compete with others for decent job and decent life, I am defenceless to severe discriminatory society up there and I don't have mesic* [sic] *hand to turn around the whole society's tradition and contemporary fashion.*

13. In answer to the question '*Do you think the authorities of that country can and will protect you if you go back?*', the applicant responded '*Since this trend stems from wrong tradition, no authority can be involved in to correct the present tendency unless*

the leading layer of the people in the society change their attitude and give away some of their vested interests'.

14. The applicant stated in his application that he had never been married or lived in a de facto relationship. He stated in his application, however, that '*I have a [Country 2] girl friend that I have lived with for 2 years. Since we love each other dearly, we prepare for marriage but my senior relatives are so conservative that they hate [Country 2] as hell. Under the circumstances marriage is unimaginable. Since the situation is as such, it is hard for us to cohabit in Korea and the situation is visa versa in [Country 2]. I can't do anything to live on in [Country 2].*

15. No supporting information was lodged with his application. The applicant failed to attend at the interview scheduled for him by the Department, and his application was rejected. He provided a copy of the *Decision Record* of the Department with his application, which states in part:

> *The applicant failed to attend a scheduled interview before me on Friday [date] November 2013. I have no further elaboration or articulation of the applicant's claims before me, and I have proceeded to consider his claims on the basis of his written application only.*
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> *The applicant claims that if he returns to South Korea he will be the subject of discrimination. He claims he will be insulted and treated badly due to a deep-seeded prejudice in Korean society against less educated people. He claims that as a result of his educational background he is unable to find employment in South Korea. While the applicant has been employed in the past, he claims his wage was insufficient to survive in South Korea.*
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> *The applicant claims his problems finding employment in South Korea due to his lack of education are exacerbated by the influx of foreign workers moving into South Korea. These workers are willing to work for less than the average wage. The applicant states that almost all factories in South Korea employ foreign workers only. The applicant claims that as a result of being unemployed he will be subjected to further mistreatment and bullying.*
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> *The applicant states his mother is in poor health, having gone through an operation in 2000. The applicant states his mother requires expensive medication, and this expense has added significantly to the poverty suffered by his family. Furthermore, the applicant's father is [Tradesperson 1], and he also struggles to find work due to old age.*
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> *The applicant has a [Country 2] girlfriend. The applicant claims that he cannot live together with his girlfriend in Korea or [Country 2]. The applicant states his senior relatives are extremely conservative and vehemently prejudiced towards [Country 2] people. His girlfriend's family in [Country 2] are similarly opposed to their relationship.*
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> *The applicant states the harm he fears is the result of ingrained social attitudes and a long history of tradition. As a result, the state will not protect him from the harm he fears, as social discrimination is accepted by leading figures in government. ...*
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> *The applicant was invited to attend an interview scheduled [in] November 2013 to discuss his claims. The letter was e-mailed to his agent as his authorised recipient at* [address provided]. *The letter informed the applicant that if he did not attend or cancel the interview without an acceptable reason, his Protection Visa application may be decided without any further delay based on the information already held at the time. However, on the date of the interview the applicant did not attend the Department offices at the scheduled time. When a*

departmental officer attempted to contact the applicant's agent there was no answer to this phone call and no opportunity to leave a message.

Given the applicant did not present for his PV telephone interview, and no further contact could be made, the only articulation of the applicant's protection claims is contained in his written application.

The applicant's claims are general in their context and no evidence to substantiate these claims has been provided. It is reasonable to expect that the applicant would provide a full and frank account of his circumstances in his refugee application.

In circumstances where I am unable to obtain further details regarding the applicant's protection claims, I have significant concerns regarding his credibility. However, as stated below, even if I do accept the applicant's stated claims as true, I do not accept that he has substantiated a well-founded fear of persecution.

In assessing this application I am sensitive to the difficulties faced by Asylum seekers, and I am open to the possibility the applicant has been under stress. On this basis I am minded not the make an adverse credibility inference against the applicant. However, as discussed below, I have found the applicant has not substantiated a claim of a well-founded fear of persecution. I have made this findings based on the claims as summarised above, which I have accepted as credible for the purpose of this assessment. ...

South Korea is widely recognised as a high-income developed country, with an emerging economy. South Korea has a market economy ranking 15th in the world by nominal GDP and 12th by purchasing power parity (PPP). It has experienced notable growth through increased global integration over the last four decades. While in the 1960s GDP per capita was comparable with poorer countries in Africa and Asia, in 2004 South Korea became a trillion-dollar economy. South Korea is identified as one of the G-20 major economies. The GDP growth rate in the third quarter of 2013 was reported as 1.10%. In September 2010 the unemployment rate in South Korea decreased from 3.10% to 3.0%.

A 2011 report commissioned by the Organisation for Economic Co-operation and Development (OECD) states that South Korea has a social welfare system consisting of three main components: social insurance (including national health insurance, a pension, and employment insurance), public assistance, and social services provided to families in need and other disadvantaged groups. Country information also reports that non-governmental organisations participate in advisory committees established by the government on poverty reduction and social welfare policies. In terms of income distribution and poverty, income inequality in Korea is below the OECD average, with an income concentration (Gini) coefficient of 0.305 compared with 0.315 for the OECD as a whole. Nonetheless, it is also noted that Korea's relative poverty rate (ie. the percentage of people living on less than one half of the median income) was 14.4% in 2006.

16. The applicant lodged his review application with the Tribunal [in] November 2013, however he did not provide any additional evidence in support of his claims for protection.

17. The applicant gave evidence to the Tribunal at the hearing [in] April 2014. He said that he had completed his application forms himself, and confirmed that they accurately reflected his claims.

18. The applicant told the Tribunal that he had met his [Country 2] girlfriend in May 2011, and they have been living together in Australia since September 2011. He said that both

he and his girlfriend were from conservative families, and that if she lived with him in Korea she would face discrimination because she would not be accepted, and he would face the same problems in [Country 2].

19. The applicant confirmed as stated in his application that he had been employed in Korea from 1998 until 2005, and that he had spent most of his time since then in Australia and [another country]. He said that in Korea he worked mainly as [Tradesperson 1] and labourer in the building industry, and that in Korea such jobs were not highly regarded. His parents still live in Korea, and his father is also [Tradesperson 1].

20. The Tribunal put to the applicant information contained in the Department's decision record about the low unemployment rate in Korea and the availability of social welfare services for those unable to find work. He said that while the general unemployment rate is low, many young people are unable to find work that they want. He also said that he could not comment on the availability of social welfare, as he had not tried to access such services.

21. The Tribunal found the applicant to be honest and straightforward in his evidence, which was completely consistent with the claims he advanced in his original application. In summary, his expressed concerns about returning to Korea relate to whether he will find work of a kind that he would like, and whether his girlfriend would be able to live with him there without facing discrimination. He has not produced or referred to any information which supports his contention that his girlfriend would face discrimination if they lived in Korea, and the Tribunal notes that in any event she is not included in his application for protection.

22. 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)). Examples of 'serious harm' are set out in s.91R(2) of the Act. These examples all involve physical harm, or economic hardship of a level which threatens the person's capacity to subsist. The Tribunal accepts that the list is not exhaustive, and also that the serious harm test does not exclude serious mental harm, such as harm caused by the conducting of mock executions, or threats to the life of people very closely associated with the person seeking protection[1].

23. The Explanatory Memorandum that accompanied the introduction of s.91R explained that this definition of 'persecution':

> *... reflects the fundamental intention of the Convention to identify for protection by member states only those people who, for Convention grounds, have a well founded fear of harm which is so serious that they cannot return to their country of nationality, or if stateless, to their country of habitual residence. These changes make it clear that it is insufficient ... that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia.*

24. This description of the statutory 'serious harm' test reflects the concept of persecution under international law as interpreted by the High Court. In *Chan v MIEA*, Mason CJ held that serious punishment or penalty, or the imposition of some significant detriment or disadvantage, for a Convention reason will amount to persecution and that harm

[1] See *Revised Explanatory Memorandum to Migration Legislation Amendment Bill (No.6) 2001* at [25].

short of interference with life or liberty may still amount to persecution. His Honour stated that:

> *…the Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage ... Obviously harm or the threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group subjected to such harassment by reason of membership of the group, amounts to persecution if done for a Convention reason. The denial of fundamental rights or freedoms otherwise enjoyed by nationals of the country concerned may constitute such harm ...*[2]

25. In the same case, McHugh J stated:

> *…to constitute "persecution" the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute "persecution" for the purposes of the Convention and Protocol. Measures "in disregard" of human dignity may, in appropriate cases, constitute persecution.*[3]

> *…the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason.*[4]

26. In the Tribunal's view, the harm feared by the applicant in this case, even accepting his evidence in its entirety, does not amount to 'serious harm' as that term is defined in s.91R. He does not claim that he would be denied access to employment or education for a Convention reason, rather that he has not had much education and that he may not obtain employment that he would be happy with because of his lack of education. The Tribunal is satisfied on the evidence set out above that there is a low level of unemployment in Korea and that social welfare services are available for those unable to find employment. In these circumstances the Tribunal is satisfied that the applicant does not have a well-founded fear of persecution should he return to Korea.

27. Accordingly, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention, and he therefore does not satisfy the criterion set out in s.36(2)(a).

28. The Tribunal then considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Korea, there is a real risk that he will suffer significant harm.

29. 'Significant harm' for these purposes is exhaustively defined in s.36(2A) of the Act. A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.

30. The Tribunal explained the definition of significant harm to the applicant, and asked him whether he believed that he would suffer such harm if he returned to Korea. He

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2 *Chan v MIEA* (1989) 169 CLR 379 at 388, per Mason CJ.
3 *Chan v MIEA* (1989) 169 CLR 379 at 430, per McHugh J.
4 *Chan v MIEA* (1989) 169 CLR 379 at 431, per McHugh J.

said that he '*had no plan*' to live in Korea, so it was difficult to comment, but he felt that while he did not fear physical harm he was concerned that he would not be able to do anything there. The Tribunal asked what he believed would happen if he returned, and he responded that he did not know, as he had not really thought about it, just that it would be very hard.

31. The Tribunal is satisfied that an inability to find work of a kind that the applicant would like does not amount to significant harm as defined in s.36(2A) of the Act. Further, as noted above he has not produced or referred to any information which supports his contention that his girlfriend would face discrimination if they lived in Korea, nor has he identified the nature of the discrimination that he claimed she would face. In these circumstances the Tribunal is not satisfied that any discrimination that the applicant or his girlfriend would suffer would amount to significant harm as defined in s.36(2A) of the Act.

32. Accordingly, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Korea, there is a real risk that the applicant will suffer significant harm as defined. The Tribunal is satisfied therefore that he is not a person in respect of whom Australia has protection obligations under s.36(2)(aa).

CONCLUSIONS

33. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

34. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).

35. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

DECISION

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

Bruce Henry
Member