

1105325 [2012] RRTA 272 (20 March 2012)

DECISION RECORD

RRT CASE NUMBER: 1105325

DIAC REFERENCE(S): CLF2007/100629 CLF2011/17691

COUNTRY OF REFERENCE: Republic of Korea

TRIBUNAL MEMBER: Peter Murphy

DATE: 20 March 2012

PLACE OF DECISION: Melbourne

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 the Republic of Korea (“ROK”) arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] June 2006, and applied to the Department of Immigration and Citizenship for the visa [in] February 2011. The delegate decided to refuse to grant the visa [in] April 2011 and notified the applicant of the decision.
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] June 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 Regulations.

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, *Applicant S v MIMA* (2004) 217 CLR 387 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.

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.
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. The expression ‘the protection of that country’ in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens

abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

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, including the protection visa application and the delegate's decision record in respect to that application, and other material referred to below.

The visa application

20. In her application the applicant states she was a [age deleted: s.431(2)] year old citizen of the ROK. She says she was born in [ROK] and prior to coming to Australia was a Karaoke hostess, and was not currently employed. She did not disclose specific details of prior employment in Australia, or details of other family in her application form.
21. She says she arrived in Australia using a ROK passport, and currently holds a passport issued in January 2011 which she says remains current until January 2012. She states she left ROK via Incheon Airport [in] June 2006 and entered Australia later the same day as the holder of a Working Holiday visa. Whilst her protection visa application documents suggest she had provided a copy of her passport, no copy is held on the department file. In terms of her residence prior to coming to Australia she stated she lived in [Country 2] in "many different places" between August 2001 and October 2005.
22. The applicant stated she left ROK to start a new life, and an agent organised a visa for her to come to Australia to work. The agent told her there was a good job for her in Australia, which was in a brothel. She did not realise she was not going to be paid, and was afraid to run away. She did not speak much English and did not know anyone, and was told if she did not stay and pay back money they would hunt her down and always find her. She feared the agent would hurt her, and had heard the brothel owner "[Ms A]" was angry with her for talking to police, and had told the agent in Korea.
23. A school friend in the brothel had now returned to Korea, and she feared she may have told her family she was doing prostitution. If the agent finds her, she fears he will force her to return to prostitution, and that she would not get protection from authorities in ROK because "*they don't like prostitutes*".
24. In response to question 6 on Part B of the application she said she had criminal charges pending in Australia for possession of a drug of dependence, knowingly receiving stolen property and providing false information to police which were adjourned to April 2011.
25. No supporting documents were provided with the application.

The delegate's decision

26. The application was considered by a delegate who in a decision record dated [April] 2011 noted the applicant first arrived in Australia in June 2006 on a working holiday (subclass

417) visa, and had not left Australia since. The delegate noted whilst on shore, the applicant applied for a subclass 442 (occupational trainee) visa, in June 2007 but was refused, and subsequently applied unsuccessfully to the Migration Review Tribunal (“MRT”) which affirmed the decision to refuse that visa [in] May 2008.

27. The delegate noted that following the MRT decision, her Bridging visa expired [in] June 2008 and she remained unlawfully in Australia until located by police in September 2010 and came to the attention of the department, and then sought protection in February 2011.
28. The delegate noted that [in] March 2011 the applicant was invited to attend a departmental interview, but did not respond, and as a result the delegate determined her application on the material available. The delegate found the applicant would not face serious harm on return to ROK and was not a person to whom Australia owed protection obligations, and refused her a protection visa.

The Review application

29. [In] June 2011 the applicant sought review of the delegate’s decision to refuse her a protection visa. No other factual information was provided.
30. [In] June 2011 the Tribunal wrote to the applicant advising it had considered all the material before it but was unable to make a favourable decision on that information. The Tribunal invited her to give oral evidence and present arguments at a hearing [in] August 2011. In that invitation the Tribunal also advised that if she did not attend the hearing, the Tribunal may make a decision without taking any further action to allow or enable her to appear before it.
31. [In] July 2011 the Tribunal received written notification of the appointment of an authorised [representative]. [In] July 2011 that representative wrote to the Tribunal requesting the hearing be deferred for “*at least 6 weeks*” because of difficulties obtaining relevant information. On the instructions of the Presiding Member, a Tribunal officer spoke with the authorised representative and indicated the Tribunal was prepared to adjourn the hearing for four weeks. [In] August 2011 the Tribunal notified the applicant through her then authorised representative that the hearing was adjourned to [September] 2011.
32. [In] August 2011 a person who had previously assisted the applicant contacted the Tribunal and advised the applicant was no longer represented by her former lawyers, and attempts were being made to get a new representative. [In] August 2011 [the representative], in response to Tribunal enquiries indicated it no longer acted on behalf of the applicant.
33. [In] September 2011 the Tribunal received a notice of appointment of a new authorised representative, and a request from that lawyer to adjourn the [September] 2011 hearing on the basis they had only recently been instructed, and could not adequately prepare by that date. Given the circumstances, and in fairness to the applicant, the Tribunal agreed to adjourn the hearing to [a later date in] September 2011, and confirmed this in writing. [In] September 2011 the representative confirmed in writing that the applicant would attend that hearing, and requested that the Tribunal take evidence from a nominated witness.
34. On [the day before the scheduled hearing] the Tribunal received a written submission prepared by the authorised representative of the applicant. That submission stated:

- The applicant arrived in Australia in June 2006 on a working holiday visa, and had arranged with people she called “gangsters” in ROK to work as a sex worker in a brothel in [City 1], and that her airfares and other costs were paid by those people.
 - She was met at the airport and taken to the brothel and her passport was confiscated by the “madam” and she was not allowed to go out.
 - She was told she would be working as a high class escort and would not be required to have a lot of clients each night, and would accompany rich men on dates, would be able to use protection and earn large sums of money. This did not occur. She worked through the nights, was exhausted and started using “ice” to stay awake.
 - She was told by the madam that she owed a lot of money for her ticket and had to work it off and would not get her passport back until she did. This was a prima facie case of trafficking for the purposes of prostitution.
 - She lodged an application for an occupational trainee visa [in] June 2007 which was refused and the refusal was affirmed by the MRT. She was granted bridging visas on the basis she was “*possibly a trafficked person*” and was under the care of the Support for Victims of Trafficking Program until the Australian Federal Police (“AFP”) decided she was not a victim of trafficking. Based on an assessment by the AFP and other agencies it was decided she was no longer eligible for the program and she was transitioned with assistance from Red Cross, and was now receiving assistance from the Salvation Army.
 - She lodged a brief protection visa application with assistance from a case worker. Her claims in her protection visa application are set out on page 4 of the delegate’s decision. Her application did not contain much detail as she was not assisted by a lawyer or migration agent.
35. Several documents were also provided including a letter dated [May] 2011 from the AFP explaining why the applicant was not considered a victim of trafficking. It also contained a Red Cross report ([March] 2011) relating to the applicant, interview notes compiled by a caseworker ([August] 2011), and extracts from articles relating to trafficking of persons, including extracts from the US Department of State “*Trafficking in Persons Report*”.
36. The submission concluded by asserting the applicant had a well-founded fear of persecution for reason of her membership of a particular social group, and that the ROK was unwilling to provide her protection. Earlier, the submission asserted she would not be offered protection by authorities and would be discriminated against in a systematic manner “*because of her being a prostitute (a member of a particular social group)*.” Finally, the submission asserted that if the Tribunal was unable to be satisfied the applicant met the criteria for the grant of a visa, it should refer the matter to the Minister for consideration under s.417 of the Act.

THE TRIBUNAL HEARINGS

The hearing [in] September 2011

37. The applicant did not attend the hearing of the Tribunal [in] September 2011, although her authorised representative [Mr B] did attend. He explained to the Tribunal he had failed to notify the applicant, and she was therefore unaware of the hearing. He also said her proposed witness was unaware of the hearing. He said when he realised this, he had attempted

unsuccessfully to contact her by phone and by going to her last notified address, but was unable to locate or contact her. He also said attempts to contact her current social worker/caseworker had been unsuccessful. He sought an adjournment on that basis.

38. The Tribunal observed this was the latest of several adjournment applications sought by or on behalf of the applicant. It also noted whilst it appeared the Tribunal had technically properly notified her of the hearing by writing to her authorised representative, it accepted she was not personally aware of the hearing and had not personally failed to attend the hearing. As such the Tribunal indicated in fairness, it would adjourn the hearing to a date to be fixed, probably in early November 2011, due to the availability of the Presiding Member. In granting this adjournment the Tribunal also stressed that given the number of adjournments and the statutory obligation of the Tribunal to determine reviews promptly, it was unlikely in the absence of very compelling circumstances that the review would again be adjourned. [Mr B] acknowledged this. He also advised there was a report from a psychologist that was yet to be received by him. The Tribunal indicated any further material, such as the report to which he had referred, could be provided prior to the next hearing.
39. The Tribunal then adjourned the hearing and subsequently notified the applicant in writing (through her authorised representative) of the resumed hearing [in early] November 2011. No response was received to that invitation, and [two days before this date], at the request of the Presiding Member, an officer of the Tribunal phoned the authorised representative to enquire if the applicant was aware of the hearing, whether she would attend, and whether it was proposed to ask the Tribunal to take evidence from any witnesses. Tribunal records indicate the Tribunal officer was advised by the authorised representative that he had been in contact with a person assisting the applicant, and would contact them the following day and then advise the Tribunal. That record also indicates the authorised representative said he would advise of any witnesses attending the hearing. On [the following day] the authorised representative contacted the Tribunal and advised the applicant would attend the hearing and that there was one other person from whom the Tribunal would be asked to take evidence.

The resumed hearing ([November] 2011)

40. The applicant attended the resumed hearing [in] November 2011, accompanied by her authorised representative, [Mr B]. She was also accompanied by [Ms C], a case worker who gave evidence to the Tribunal. The hearing was conducted with the assistance of an interpreter in the English and Korean languages.
41. At the commencement of the hearing the Tribunal asked about the psychologist's report referred to by the authorised representative at the initial hearing. [Mr B] indicated the provider of that report was unwell and there would be a delay of about 2 weeks before the report could be provided. He also supplied written confirmation of that situation, along with additional supporting material in the form of a report from [Ms C], and a short report from a caseworker relating to a recent medical consultation by the applicant.

Evidence of the applicant

42. The applicant told the Tribunal she was [age deleted: s.431(2)] years of age, and had grown up in Seoul, in the Republic of Korea although she had lived in [Country 2] for 4-5 years prior to 2005.

43. She told the Tribunal her parents separated when she was young, and divorced although they had re-partnered in more recent years. She said when she was a teenager she lived in a variety of places, and described what appeared to be an itinerant lifestyle. She said she initially worked in gas stations, or factories but subsequently worked in a karaoke bar in the Republic of Korea. In response to questions about the nature of her work in those bars she said she sometimes had sex with customers, but was mostly involved in promoting drinking amongst customers. She said at the time she was doing this work she was legally underage, and had to run away from police. She said she did not wish to do this work but did so because of economic circumstances. She told the Tribunal she went to [Country 2] in the early 2000s, where she worked for 1-2 months as a sex worker and the balance of the 5 years she was there she worked in karaoke bars. She said when she went to [Country 2] she owed money but after 5 years had paid back all her debts. She said after returning to Korea she stayed 6 months before moving to [Country 3] where she worked for about 3 months. She said in the 6 months in Korea, she stayed with friends and told the Tribunal her father had travelled to [Country 2] and had paid a large sum of money to release her from her debts. She said her father was still alive, and was again living in the same house as her mother, although she described her parent's relationship as one where they were not talking to each other.
44. She told the Tribunal she had then wanted to go to the United States, as she had met a woman in Hong Kong who said there was a lot of money to be made there as a sex worker. She ultimately decided to come to Australia, as she thought she could work here as a sex worker and picked an agency in Korea through which to work. She described that agency as being run by a "gangster".
45. She said she chose Australia as a place to work because she believed Las Vegas was the best place to work, whilst Australia was the second best choice because there are a lot of rich men and you could make a lot of money. She agreed she knew she was going to work in the sex industry but said she chose to come here because she had no other choice as she no money.
46. She said when she arrived a man picked her up from the airport and took her to a place, and the operator held on to her passport. She gave conflicting evidence about her passport. Initially she said it was taken from her and she was unsure whether she ever got it back. Later however she said it was returned to her at some stage, and she had lost it sometime later.
47. The applicant gave a disjointed explanation of her work in Australia, but ultimately said after working in a brothel in [City 1] managed by a woman called "[Ms A]" she was initially not allowed to leave and had to work long hours. She said that within a short time of arriving there she commenced taking drugs, but when [Ms A] the brothel manager found out about this they dumped her, and she subsequently found her own premises. The Tribunal observed this was inconsistent with her description of not being able to leave the workplace, and asked how she was able to do this. She then said the brothel manager liked her because she was popular, and allowed her some latitude. She said she continued to work with [Ms A] even though she was living away from the brothel, paying money to [Ms A] to pay off the agency through which she organised work in Australia. She said she ended the relationship with [Ms A] because of her drug abuse, but subsequently contacted [Ms A] and asked if she could come back to work for her. She said [Ms A] then gave her work because she was popular, and because [Ms A] liked her. She said in total she worked for [Ms A] for about 2 years, but had problems with drugs and rashes, and stopped work.

48. She said around this time she overstayed her visa, and needed to extend it and paid a considerable sum of money to a broker to attempt to get a further visa for her. She said she subsequently obtained a bridging visa, but overstayed on that visa and was subsequently detained by police during a raid on a hotel she was staying at.
49. She said she was referred to the AFP, who initially assessed her as a potential victim of trafficking, which she believed she was. The Tribunal observed the letter she provided from the AFP indicated she was not ultimately assessed as a victim of trafficking, and asked if she knew why the AFP reached this conclusion. She said it was because she was scared of [Ms A], and had decided not to give away any information. She said she did not understand the reason for the AFP decision, as she was not sober at the time and didn't cope well.
50. The Tribunal asked her what she feared if she returned to Korea. She said she had been told by the AFP that 3 brothels in [City 1] had been burnt down. She said she believed [Ms A] would follow her anywhere to harm her and her family. The Tribunal asked when she had last had any contact or had spoken to [Ms A]. She said it might have been about 2½ years ago. The Tribunal observed this appeared a long time, and it had some difficulty accepting [Ms A] would now seek to harm her after such a long period. It asked her whether she had been the subject of any threats in Australia. She indicated she had not been threatened, but felt like she was being watched by someone. She said maybe [Ms A] was waiting until she returned to Korea where she would be at risk. She then said [Ms A] had disappeared, but she had seen [Ms A]'s husband on the street and at [a] Casino, but had not spoken to him for 2 years. She subsequently said she has last seen him in a street in the last six months.
51. The Tribunal asked if there was anything else she wished to say. She indicated she did not wish to go back to Korea because, since she had been in Australia, her life had been up and down with drugs, she had contemplated suicide, and if she went back she thought she may die, or commit suicide. She said she had no future or family in Korea to which to return and coming to Australia was really her last chance. She said in Korea she would be discriminated against, and had no opportunity to find gainful employment. The Tribunal asked her whether she could work in a different sort of job, such as a shop or factory. She said she had been moving around for about 10-15 years and asked how she could possibly get a job.
52. The Tribunal asked her if she thought she would be able to obtain protection in Korea if she was threatened for any reason. She said she could not get protection, but if she was threatened, she would welcome such things. At that point she became distressed, and although the Tribunal offered to adjourn the hearing, she declined the offer of a break.
53. She told the Tribunal again that she had been deceived by the people who had arranged for her to come to Australia as to the type of work she would be doing and the clientele, that led to her doing drugs, and if she went back to Korea there was no place for her to go, and she would probably just have to sit at the airport. She said she feared she may be harmed by [Ms A] and her associates in Korea, and gangsters from whom she had borrowed money.
54. The Tribunal referred the applicant to country information which suggested the Republic of Korea was a democracy, with an effective police force that was responsive to complaints. The applicant said she did not believe she would be safe, and in Korea if you had no money you simply died, whereas in Australia there was a chance for her and she may be able to study and find some other job. At her age she said she could not return to Korea, as she had been away from the country for 10 years now, and it had bad memories for her.

55. The Tribunal asked if there were any other reasons why she did not wish to return to Korea. She said she was working in a brothel with a girl she knew from her middle school, who had returned to Korea. She said she believed that woman may have told people in Korea that she had travelled to Australia and worked in a brothel as a sex worker and was doing drugs. She said in Korea how you look is important, and without education she could not build a life.
56. The Tribunal invited the applicant's representative to indicate if there were any other questions he believed the Tribunal should ask his client. He suggested the Tribunal ask if there were any promises made by the AFP to her. The Tribunal put that question to her. She said although she did not know herself, she believed the Red Cross representative had spoken to the AFP and that she had been promised permanent residency, although she conceded this was not an offer put directly to her. Ultimately she said nothing came of this.
57. The Tribunal also, at the suggestion of her representative, asked how she was introduced to drugs. She said it was through the Chinese manager at the brothel she worked in. She also told the Tribunal that when the AFP determined that she was not a victim of sex trafficking they effectively stopped providing support for her and "kicked her out" of the program and the accommodation they had arranged for her. As a result, she had no income and relied on support from community aid and some form of benefit. She was unaware of the nature of that benefit, beyond the fact she believed it was from "Immigration".

Evidence of a witness

58. The Tribunal also took evidence from [Ms C], a social worker who is the case officer from the [name deleted: s.431(2)] Program currently providing assistance to the applicant. She said the applicant was referred to that program after determination by the AFP that she was not a victim of sex trafficking. She said the applicant continued to be reliant on the program for her accommodation and support.
59. [Ms C] stated she had sought release of information held by the AFP under the Freedom of Information Act, but the due date for that material was not until [some days later in] November 2011. In particular she had sought information relating to interviews with the applicant and the basis of the determination that she had not been the victim of trafficking. She also said she had personal association with the applicant, who had explained her fear of return to ROK and details of her background, which she said was often difficult to obtain. She said the applicant had told her she would rather commit suicide than to return to ROK and that she felt ashamed to approach her family because of her work in the sex industry and her past. She also said the applicant had expressed fear of harm by gangsters and others in ROK if she was to return, and the applicant feared that the brothel manager in [City 1] for whom she had worked had connections in ROK and may harm her.
60. She said she believed there was police corruption and a lack of respect for women who had worked in the sex industry and who used drugs, and the applicant feared she may face prosecution because of her drug use. She also said the applicant had said she feared harm because of reports of former prostitutes being kidnapped and taken to "fishermen's island" where they were forced to engage in sex acts, and that police ignored such matters.
61. At the conclusion of the evidence of the applicant and the witness, the Tribunal indicated it considered it appropriate to withhold a decision for 3 weeks to allow the provision of the report from the psychologist, and potentially the release of information from the AFP as a result of the FOI request by [Ms C]. It indicated it may be necessary to reconvene the hearing

after that time, but would determine this in light of any further information or submissions it received within that period.

62. Despite the indication at hearing by both the applicant's authorised representative and her witness that further documentary material might be provided in a post hearing submission, no further correspondence has been received. The Tribunal has accordingly reached its decision on the basis of the material available to it.

COUNTRY INFORMATION

63. Korean law forbids discrimination on the basis of gender, religion, disability, social status and race. Although the government generally respects these provisions, traditional attitudes limit opportunities for women.¹
64. Under the constitution women have equal legal rights as men.² Women, however, face discrimination in practice, with men enjoying more social privileges and better employment opportunities.³ Violence against women and sexual harassment continue to be problems.⁴
65. The United States Department of State "*Country Reports on Human Rights Practices*" for 2010 (published in April 2011) contains the following comments on ROK:

The Republic of Korea (Korea or ROK) is a constitutional democracy governed by President Lee Myung-bak and a unicameral legislature. The country has a population of approximately 48 million. In 2008 the Grand National Party obtained a majority of National Assembly seats in a free and fair election. Security forces reported to civilian authorities

....

Role of the Police and Security Apparatus

Civilian authorities maintained effective control over the Korean National Police Agency, and the government has effective mechanisms to investigate and punish abuse and corruption. There were no reports of impunity involving security forces during the year.

....

Civil Judicial Procedures and Remedies

There is an independent and impartial judiciary in civil matters, and there were no problems enforcing domestic court orders. Citizens had access to a court to bring lawsuits seeking damages for, or cessation of, a human rights violation. There are administrative and judicial remedies available for alleged wrongs.

...

Section 4 Official Corruption and Government Transparency

¹ US Department of State 2010, 'Section 6 Discrimination, Societal Abuses, and Trafficking in Persons' in *Country Reports on Human Rights Practices for 2009 – Republic of Korea*, 11 March –

² US Department of State 2010, 'Women' in *Country Reports on Human Rights Practices for 2009 – Republic of Korea*, 11 March –

³ Freedom House 2010, *Freedom in the World – South Korea*, June <http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7854> – Accessed 10 September 2010 –

⁴ US Department of State 2010, 'Women' in *Country Reports on Human Rights Practices for 2009 – Republic of Korea*, 11 March –

The law provides criminal penalties for official corruption, and the government implemented the law effectively. There were reports of officials receiving bribes and violating election laws. According to the Ministry of Justice, as of November 481 government officials had been prosecuted for abuse of authority, bribery, embezzlement or misappropriation, and falsification of official documents. In the National Assembly, as of November one member was in detention and another was on trial for misappropriation and other criminal charges.

By law public servants above a certain rank must register their assets, including how they were accumulated, thereby making their holdings public. Several government agencies are responsible for combating government corruption, including the Board of Audit and Inspection, which monitors government expenditures, and the Public Service Ethics Committee, which monitors civil servant financial disclosures and financial activities. The Anti-Corruption and Civil Rights Commission manages public complaints and administrative appeals on corrupt government practices. In the first half of the year, the commission logged more than 1,500 corrupt government practice claims. The commission also evaluates "good governance and cleanliness" of public organizations and expanded the number of organizations under its purview to 712, compared with 478 in 2009.

The country has a Freedom of Information Act, and in practice the government granted access for citizens and noncitizens alike, including foreign media.

d. Freedom of Movement, Internally Displaced Persons, Protection of Refugees, and Stateless Persons

Citizens could generally move freely throughout the country; however, government officials restricted the movement of certain DPRK defectors by denying them passports. In many cases travelers going to the DPRK must receive a briefing from the Ministry of Unification prior to departure. They must also demonstrate that their trip does not have a political purpose and is not undertaken to praise the DPRK or criticize the ROK government.

66. The 2009 United States Department of State "*Country Reports on Human Rights Practices*" contained the following specific commentary on prostitution related actions by ROK law enforcement and government officials:

Prostitution is illegal but widespread. The police continued to crack down on alleged prostitution-related establishments. The government allows for the prosecution of citizens who pay for sex or commit acts of child sexual exploitation in other countries. The Act on the Prevention of the Sex Trade and Protection of Victims Thereof, which entered into effect in September 2008, further stipulates that the MOGE complete a report every three years on the status of domestic prostitution in addition to the involvement of citizens in sex tourism and the sex trade abroad. NGOs continued to express concern that sex tourism to China and Southeast Asia was becoming more prevalent.

The law establishes a minimum sentence of 25 years for the brokerage and sale of the sexual services of persons younger than 19. It also establishes prison terms for persons convicted of the purchase of sexual services of youth under age 19. The Ministry for Health, Welfare, and Family Affairs publicizes the names of those who commit sex offenses against minors. The law provides for prison terms of up to three years or a fine of up to 20 million won (approximately \$17,100) for owners of entertainment establishments who hire persons under 19. The commission's definition of "entertainment establishment" includes facilities such as restaurants and cafes where children work as prostitutes.

The minimum age for consensual sex is 13 years of age. The law stipulates that punishment for statutory rape of a minor and the sex trafficking of a minor be a maximum of three years in prison and/or a 2.4 million won fine (approximately \$20,000); however, the MOJ reported that the punishment for such cases varied.

The law prohibits all forms of trafficking in persons; however, there were reports that persons were trafficked to, from, through, and within the country. Women from Russia, other countries of the former Soviet Union, China, Mongolia, the Philippines, and other Southeast Asian countries were trafficked to the country for sexual exploitation and domestic servitude. They were recruited personally or answered advertisements and were flown to Korea, often with entertainer or tourist visas. Some female workers on E-

6 (entertainment) visas, who were recruited as singers, were trafficked by their employers/managers and effectively detained by their employers.

An increasing challenge was the number of women from less-developed countries recruited for marriage to Korean men through international marriage brokers. Some, upon arrival in the country, were subjected to sexual exploitation, debt bondage, and involuntary servitude. In some instances, once these visa recipients arrived in the country, employers illegally held victims' passports.

Local women were trafficked primarily for sexual exploitation to the United States, sometimes through Canada and Mexico, as well as to other countries such as Australia and Japan. Labor trafficking continued to be a problem, and some employers allegedly withheld the passports and wages of foreign workers. Migrants seeking opportunities in the country were believed to have become victims of trafficking as well. The MOL's Employment Permit System (EPS) was used to reduce the role of private labor agencies and recruiters, who may have employed exploitative practices. Nevertheless, some migrant workers continued to incur large debts to pay exorbitant broker fees for work in the country. Migrant workers' residence status was tied to their position with their employers, which in some cases exposed them to exploitation and abuse. There were reports that human traffickers illegally used ROK passports for the purpose of human trafficking. There was no evidence that officials were involved in trafficking.

The law prohibits trafficking for the purpose of commercial sexual exploitation, including debt bondage, and prescribes up to 10 years' imprisonment. Trafficking for forced labor is criminalized and carries penalties of up to five years' imprisonment. February 2008 revisions to the Passport Act allow for restricted issuance or confiscation of passports of persons engaging in illegal activity overseas, including sex trafficking. However, some NGOs believed laws against sex trafficking were not being enforced effectively. During the year authorities reportedly conducted 220 trafficking investigations and prosecuted 31 cases, all for sex trafficking. It was unclear, however, how many of these actually were trafficking cases, since the laws used to prosecute traffickers were also used to prosecute other crimes, and the government does not document adequately the number of trafficking cases. There were no reported prosecutions or convictions for labor trafficking offenses.

The KNPA and the MOJ were principally responsible for enforcing antitrafficking laws. The government worked with the international community on investigations related to trafficking. (Source: <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135996.htm> accessed 26 July 2011).

67. The US Department of State, in its 2011 "*Trafficking in Persons Report*" contained the following information on ROK:

The Republic of Korea (ROK or South Korea) is a source, transit, and destination country for men and women subjected to forced prostitution and forced labor. Some men and women from Russia, Uzbekistan, Kazakhstan, Morocco, Colombia, Mongolia, China, the Philippines, Thailand, Cambodia, North Korea, Vietnam, Japan, and other Southeast Asian countries are recruited for employment or marriage in the ROK, and subjected to forced prostitution or forced labor. Some foreign women who entered the country on entertainment visas, were trafficked for forced prostitution. Some women from less developed countries recruited for marriage with South Korean men through international marriage brokers are subjected to forced prostitution or forced labor upon arrival in the ROK or when running away from abusive spouses; some brokers reportedly charged up to \$20,000 from Korean clients. The use of debt bondage was common among sex trafficking victims, and employers and brokers often found ways to compound victims' debt. Many of these women also faced nonpayment of earnings, withholding of their passports, and restrictions on their movements. South Korean women were subjected to forced prostitution domestically and abroad in destinations including the United States, Canada, Japan, and Australia, many coerced by traffickers to whom they owed debts. According to government authorities, South Korean teenagers are increasingly exploited in prostitution; particularly runaways, more than 95 percent of commercial sexual exploitation of children in South Korea is arranged over the Internet.

Migrant workers who travel to the ROK for employment may incur thousands of dollars in debts, contributing to their vulnerability to debt bondage. There are approximately 500,000 low-skilled migrant workers in the ROK from elsewhere in Asia, many of whom were working under the Employment Permit System (EPS). While protections were implemented for EPS workers, observers claimed the EPS assigns excessive power to employers over workers' mobility and legal status, making them vulnerable to

trafficking. Migrant workers commonly face conditions indicative of forced labor, including nonpayment of wages, withholding of passports, and work upon arrival in the ROK that differs from the job description offered to them in their country of origin. Korean men remain a source of demand for child sex tourism in Southeast Asia and the Pacific Islands.

The Government of the Republic of Korea fully complies with the minimum standards for the elimination of trafficking. The government reported significant efforts to prevent trafficking during the reporting period, including through anti-trafficking public awareness campaigns targeting vulnerable groups, such as teenagers at risk of commercial sexual exploitation and foreign wives in South Korea. South Korea also maintains an extensive network of victim protection services throughout the country, and works in cooperation with NGOs to provide care to identified victims of trafficking. In addition, South Korea allocated significant resources to protecting victims of trafficking and continued to train law enforcement and other government officials on trafficking in persons. The government's efforts to investigate labor trafficking remained relatively weak, however, and the government did not institute formal procedures to proactively identify victims of trafficking.

Recommendations for the Republic of Korea: Enact drafted comprehensive anti-trafficking legislation that defines and prohibits trafficking in persons; increase efforts to investigate, prosecute, and convict trafficking offenders, including those involved in labor trafficking; ensure that convicted traffickers receive jail sentences for trafficking offenses; develop and implement formal victim identification procedures to proactively identify trafficking victims among vulnerable populations, including women arrested for prostitution and illegal immigrants; make greater efforts to identify victims of forced labor among migrant workers, such as those who file complaints of unpaid wages; proactively grant victims permission to work pending investigations and prosecutions against their traffickers; and take steps to increase awareness of child sex tourism and enforce laws against South Koreans engaging in such acts.

Prosecution

The ROK government took adequate steps to prosecute trafficking offenses during the reporting period, but its efforts were hampered by the lack of a clear law prohibiting all forms of trafficking. South Korea prohibits most aspects of trafficking through its 2004 Act on the Punishment of Acts of Arranging Sexual Traffic and its Labor Standards Act, which prescribe up to 10 years' and five years' imprisonment, respectively; these penalties are sufficiently stringent and commensurate with those prescribed penalties for other serious crimes. The government also reports using other criminal statutes related to kidnapping and juvenile protection to prosecute and punish trafficking offenses. During the reporting period, government authorities reported investigating 40 cases under the Act on the Punishment of Acts of Arranging Sexual Traffic; however, this resulted in only six convictions – a significant decrease from the 17 convictions reported last year – with only four traffickers serving prison sentences ranging from 18 months to two years; two trafficking offenders received only fines as punishment. Authorities investigated 43 cases under the Labor Standards Act, but reported only one indictment and no convictions or sentences for forced labor. The government reported 338 investigations under other statutes related to trafficking, resulting in 110 indictments, 68 convictions, and 37 prison sentences. The Ministry of Employment and Labor (MOEL) received over 9,000 complaints from migrant workers of \$19 million in unpaid wages and reported helping resolve 96 percent of these cases; the ROK did not, however, report investigating any of these complaints for forced labor. During July and August 2010, ROK police authorities conducted a special crackdown on illegal international marriage brokers, arresting 761 for illegal operations and indicting 399 of them. Korean authorities also continued to train law enforcement and other government officials on trafficking and created a standardized training program on sex trafficking prevention. There were some reports police officers took bribes from brothel owners in exchange for prior notice about police raids; the government did not, however, report any law enforcement efforts against official complicity in trafficking offenses. During the reporting period, the government upgraded its data collection system to provide more detailed information on human trafficking prosecutions.

Protection

The Government of the Republic of Korea sustained robust efforts to protect trafficking victims during the reporting period, but its victim protection efforts were weakened by its lack of formal proactive victim identification procedures across the government. In 2010, the government spent approximately \$16.8 million to protect sex trafficking victims, mainly by providing financial support to NGOs offering shelter, counseling, medical and legal assistance, and rehabilitation services. The government also operates one

shelter for foreign victims of sex trafficking, but did not report the number of victims assisted at this facility during the reporting period. The government expanded its extensive network of support centers for foreign wives and runaway teenagers, which offer support such as counseling in various languages, legal advice, and referral to medical services and shelters. Although the government continues to lack a formal system to proactively identify victims of trafficking among vulnerable groups, there were 76 victims identified in 2010, 26 of whom were identified by government authorities and all of whom were victims of sex trafficking. Foreign sex trafficking victims may receive temporary relief from deportation under the G-1 visa system, which allows them to remain in South Korea for up to one year to participate in investigations against their traffickers. Victims reportedly may apply for employment authorization under the G-1 visa, but NGO and other sources report that, in practice, the government has not authorized any existing G-1 visa holder to work pending an investigation or prosecution. The government did not report issuing a G-1 visa to any victim during the reporting period. Foreign victims of trafficking are offered legal alternatives to removal to countries in which they may face hardship or retribution. North Korean victims of trafficking may receive refugee settlement services. MOEL operated seven Migrant Workers' Centers nationwide to assist foreign workers in 15 different languages and the Seoul Metropolitan City Government maintained six similar centers; during the reporting period, the Seoul City Government opened its first migrant center with shelter facilities that would appear to be accessible to male victims of trafficking. However, the ROK government did not report efforts to proactively identify victims of trafficking during large crackdowns on illegal immigrants during the reporting period. As a result of the government's lack of proactive victim identification procedures and relatively less awareness of labor trafficking than of sex trafficking, victims of forced labor may have been arrested and deported for crimes including illegal immigration without receiving any protection services.

Prevention

The ROK government took steps to prevent trafficking during the reporting period, though these efforts focused primarily on sex trafficking. The government continued to conduct a wide variety of campaigns to raise awareness of trafficking in South Korea, targeting particularly vulnerable groups such as teenagers and foreign wives. In December 2010, the Ministry of Gender Equality and Family (MOGEF) developed training materials on sex trafficking for juveniles for distribution in schools and to public officials. MOGEF also launched the "Youth Keeper" program to notify police authorities when Internet sites were being used to arrange the prostitution of children and operated 77 shelters for runaway teenagers to reduce their vulnerability to commercial sexual exploitation. In addition, MOGEF ran specific campaigns to raise trafficking awareness among foreign wives, including messages publicizing the Emergency Support Center for Migrant Women on buses, electronic billboards, subways, and in foreign language publications. The Ministry of Foreign Affairs and Trade (MOFAT) also hosted pre-departure trainings for Koreans participating in working-holiday programs in Australia on their vulnerability to sex trafficking. In an effort to reduce demand for commercial sex acts, the Ministry of Justice continued to run 39 "Johns Schools," requiring convicted male "clients" of prostitution to attend one-day seminars on the risks of prostitution and sex trafficking in lieu of criminal punishment. According to reports from destination countries, South Korean men continue to be a source of demand for child sex tourism in Southeast Asia and the Pacific Islands. In response to reports in recent years that South Korean men engage in sex tourism, MOFAT continued to run public awareness campaigns against prostitution overseas, but during the reporting period, the government did not prosecute any Korean nationals for engaging in child sex tourism abroad or make other efforts to reduce the demand for this practice. The ROK government provided anti-trafficking training to troops prior to their deployment abroad on international peacekeeping missions. The Republic of Korea is not a party to the 2000 UN TIP Protocol. (<http://www.state.gov/g/tip/rls/tiprpt/2011/index.htm> - US Department of State, "Trafficking in Persons Report 2011- South Korea, accessed 4 November 2011).

68. An article on 6 July 2011 ("*S. Korean sex workers threaten to set themselves on fire to protect their brothels*") reported that tough laws introduced in ROK some 7 years earlier were driving thousands of prostitutes out of business, and that police were actively cracking down on brothels, prostitutes and customers. That article also indicated:

South Korea runs nine support centers offering vocational training and psychological counseling to former prostitutes where they can work for a monthly salary of about \$460 to \$920, according to government officials.

Many women, however, find it hard to adjust to new lives and to resist the better pay of sex work. Despite the social stigma, they drop out of the centers and return to prostitution. (Source: http://www.msnbc.msn.com/id/43650531/ns/world_news-asia_pacific/t/s-korean-sex-workers-threaten-set-themselves-fire-protect-their-brothels/#)

FINDINGS AND REASONS

69. The Tribunal finds the applicant is a citizen of ROK and no other country. It accepts she was born in that country and holds a passport issued by that country, and that used a ROK passport to legally enter Australia in 2006. Her claim to refugee status is therefore assessed on the basis ROK is her country of nationality.
70. The Tribunal finds the applicant came to Australia in 2006 specifically to pursue work in the sex industry, and commenced worked in that industry immediately after her arrival. Whilst the Tribunal is prepared to accept she may have been misled to some extent by the description of working conditions and the type of clients she would be servicing, it does not accept she was the victim of trafficking, or was lured to Australia in the expectation of work outside the sex industry. In reaching these findings the Tribunal accepts the evidence of the applicant herself she had applied through an agency in ROK on the express understanding she would be working in the sex industry, and that she had previously worked in that industry in both ROK and [Country 2] and [Country 3].
71. The Tribunal does not accept the applicant was held captive or detained by persons conducting the brothel in which she worked as claimed. In reaching this conclusion the Tribunal notes her evidence on this issue was unconvincing, and she ultimately conceded she obtained her passport from the operators of the establishment concerned, and set herself up in her own flat. It also accepts her evidence that after she ceased working on site for the brothel manager concerned ([Ms A]) she herself approached [Ms A] and sought further work in the sex industry, and was given that work, because she was “popular”, and [Ms A] liked her.
72. The Tribunal does not accept the applicant has a well-founded fear of persecution by [Ms A] or any associates of [Ms A] in ROK because of her involvement in the sex industry or her decision to leave the brothel where she worked when she first arrived here. In reaching this conclusion the Tribunal notes her own evidence was that after she chose to leave work for [Ms A], she subsequently approached [Ms A] and sought further work. The Tribunal considers this inconsistent with the existence of any fear of [Ms A]. The Tribunal also notes the applicant conceded in her evidence she had a good relationship with [Ms A], and in any event ceased involvement with her some years ago and claimed she had not seen her for more than two and a half years. The Tribunal also considers there is less than a remote chance [Ms A] or any associates she may have in ROK would have any interest whatsoever in the applicant if she was to return to ROK now or in the reasonably foreseeable future. Similarly it does not accept the agent or gangster who previously recruited her to work in Australia in 2006 would have any interest in seeking to force her to return to prostitution if she returned to the ROK.
73. The applicant asserted she feared harm from [Ms A] or her associates or gangsters or agents in ROK because she owed them money. There is no evidence beyond the assertion of the applicant herself that she owes money to such persons, and the Tribunal did not find her evidence on this issue to be credible. In reaching this finding the Tribunal notes the applicant stated at hearing that after first working for [Ms A] in [City 1], she left that work and then approached [Ms A] to work for her again. She also conceded her passport was returned to her by the operator. The Tribunal considers this evidence is inconsistent with her assertion that

she feared [Ms A] or owed money to her or anyone else, and that if she had (as she claimed) owed money to [Ms A] or anyone else associated with her, she would not voluntarily have approached [Ms A] and re-established a working connection with her.

74. The Tribunal does not accept the applicant has a well-founded fear of persecution by the “gangster” through whom she claims to have found employment in Australia as a sex worker. In reaching this conclusion the Tribunal notes she has been living in Australia since 2006, and it does not consider any one associated with her recruitment to work in Australia would now have any interest in her. The Tribunal further finds the applicant does not have a well-founded fear of harm at the hands of “gangsters” in Korea because she had been involved with the Australian Federal Police or regulatory agencies in Australia. In reaching this conclusion the Tribunal is not satisfied her involvement with such agencies would be known outside Australia, or even within Australia beyond the agencies themselves, and notes in any event on her own evidence, she did not provide any information to such agencies that was relevant to criminal offences committed in Australia or overseas.
75. The applicant also says she fears her family may have learned about her sex work and drug use in Australia, and as a result will reject her. The Tribunal cannot discount the possibility that such knowledge may reach her family, and that they may disapprove or even reject her because of that activity. The Tribunal is however not satisfied that such reaction or rejection, were it to occur, would amount to “serious harm” as required under s.91R(3) to constitute persecution, nor is it satisfied any such reaction or rejection would be for one of the reasons set out in the Convention definition.
76. The Tribunal accepts sex workers or former sex workers and drug users or former drug users may constitute a particular social group or groups for the purposes of the Convention. It also accepts that as a member of such a group or groups, the applicant might face societal disapproval, or even some discrimination because of her membership of such group or groups. The Tribunal does not however accept the assertion by the applicant that because of her membership of such group or groups she would face “serious harm” as required under s.91R(3) to amount to persecution. In particular it does not accept she would face adverse treatment amounting to a threat to her life or liberty, significant physical harassment or ill-treatment or significant economic hardship or denial of access to basic services be denied the ability to subsist, or face deprivation of her ability to derive a livelihood because of that membership or her sex work or drug use. It also does not accept her assertion that if she returned to ROK, she would be compelled to work in the sex trade, and would in some way be precluded from finding alternate work in some other capacity. The Tribunal acknowledges the applicant may face some challenges finding employment, but considers this would be largely due to her limited education, and absence of work experience- factors she herself identified in the course of her evidence.
77. The Tribunal is however satisfied that if the applicant was to face any threats or harm from a non-state actor in ROK for any reason, protection would not be withheld from her because she had been a sex worker, a drug user or for any other reason. In reaching this conclusion the Tribunal accepts and prefers the country information set out above, which suggests ROK has a functioning police force, from which the applicant could seek protection. It accepts country information above also indicates whilst ROK authorities are taking steps to crackdown on brothels and the sex trade, there are also established centres to help former prostitutes gain vocational and counselling assistance. (See the msnbc article from July 2011, above).

78. The Tribunal also accepts other country information (see the US DOS “*Trafficking in persons Report*”) which indicates the government of the ROK has in recent times made considerable efforts to support persons who may have been trafficked and has taken action to prosecute traffickers. It considers this type of action is also consistent with an official willingness on the part of ROK authorities to afford protection to persons facing harm as a result of past involvement in the sex trade. The Tribunal is also not satisfied there is any reliable evidence before it to suggest police or authorities in the ROK would withhold protection to persons who are, or were prostitutes or drug users.
79. The Tribunal also rejects as lacking credibility her unsupported assertion that sex workers were sometimes taken to an island where they were assaulted, and police did not intervene to prevent such activities. Beyond a generalised assertion there is no reliable information to support such a claim. The Tribunal also does not accept her assertions that she may be harmed or assaulted by authorities or police if she returned to ROK now or in the reasonably foreseeable future. In reaching these conclusions the Tribunal again accepts country information above that indicates ROK is a constitutional democracy, with a functioning police force, where civilian authorities maintained effective control over the police and the government has effective mechanisms to investigate and punish abuse and corruption by officials and does so.
80. As a result the Tribunal is not satisfied that the applicant has a well-founded fear of persecution for a Convention reason if she returned to ROK now or in the reasonably foreseeable future.

CONCLUSION

81. Having considered her claims individually and cumulatively, 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

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

Other issue

83. The applicant, through her authorised representative also indicated in writing that if the Tribunal was unable to be satisfied the applicant met the criteria for the grant of a protection visa, it ought to refer her matter to the Minister for consideration under s.417 of the Act.
84. The Tribunal is not under an obligation to make such a referral, and in this case does not do so, partially because there is a lack of relevant material before it concerning the current state of the applicant. In this regard the outstanding psychological report referred to by the authorised representative at the resumed hearing may contain some useful additional material on that aspect.
85. It remains open to the applicant however to make her own application to the Minister pursuant to s.417 of the Act, consequent upon the Tribunal have reached the decision set out above.

