1110127 [2012] RRTA 21 (4 January 2012)

DECISION RECORD

RRT CASE NUMBER:	1110127
DIAC REFERENCE(S):	CLF2011/146350
COUNTRY OF REFERENCE:	Brazil
TRIBUNAL MEMBER:	Mary Cameron
DATE:	4 January 2012
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

2. The applicants, who claim to be citizens of Brazil arrived in Australia on [date deleted under s.431(2) of the Migration Act 1958 as this information may identify the applicant] December 2005 and applied to the Department of Immigration and Citizenship for the visas [in] August 2011. The delegate decided to refuse to grant the visas [in] September 2011 and notified the applicants of the decisions.

3. The delegate refused the visas on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention

4. The applicants applied to the Tribunal [in] September 2011 for review of the delegate's decisions.

5. The Tribunal finds that the delegate's decisions are RRT-reviewable decisions under s.411(1)(c) of the Act. The Tribunal finds that the applicants have 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. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 (the Regulations) for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a spouse and a child.

9. 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'

10. 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.

11. 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.

12. 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.

13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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

20. The Tribunal has before it the Department's file relating to the applicants. 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.

21. In support of the visa application the applicants provided a detailed written submission, according to which the application has been lodged so that the first named applicant and her family can ultimately seek the Minister's discretionary grant of a permanent visa, to enable them to remain in Australia where they have lived for six years.

22. According to the applicants' submission their family's circumstances are unique and compassionate, for reason that the first named applicant is unable to survive in Brazil due to her mental health problems and previous suicidal ideation.

23. According to the applicants' submission they arrived in Australia in December 2005 as the holders of tourist visas with condition 8503 attached. It is now recognised that the first named applicant suffered from depression in Brazil and that she was suicidal when she arrived in Australia She was not treated for her condition in Brazil, which is part of the reason why she fears returning there.

24. According to the applicants' submission if the first named applicant is forced to return to Brazil she will be denied the capacity to subsist because her mental illness will prevent her from being able to work, and to care for herself and her family. It is even contemplated by mental health professionals who have treated her that she will again consider suicide.

25. The submission cites a report in respect of the first named applicant by psychologist [Dr A]:

[The applicant] reports having what was likely Major Depressive Disorder in her 20's. She does not use this language to describe her experience but in her clinical assessment it became clear she would have met criteria for this diagnosis then. She reported that she became unemployed and was very anxious about how she would look after herself and even survive physically. She reported feeling overwhelmed by this situation and her overwhelming negative feelings led her to strongly consider suicide. When asked why she did not get help financially from friends or family at that time, she reported matter-of-factly that there was no-one who could help her as they were all struggling too. Also she added that when you are unhappy (i.e. depressed) people in Brazil "don't want to know you" She reported that she felt she had no-one to talk to or turn to for financial help at the time and she did not know how she was going to survive. She stated that she considered ingesting a poison very seriously and she was so close to doing so that she recalls the process of thinking through which type she would use as there seemed to be so many to choose from and spending a lot of time thinking this through.

Severity of suicidal ideation in the context of depression is usually understood by degree ranging from a fleeting thought through to consideration of means and obtainment of means. [The applicant's] suicidal ideation was significant and the fact she contemplated which poison to take and that she thought about it for long lengths of time indicates her depression was likely severe. After asking her questions relating to this depressive episode, it became clear she would have likely met criteria for Major Depressive Disorder at that time and would have required treatment (she reports she did not receive treatment). [The applicant] only reluctantly reported what happened to her in her 20's and when asked about any other experiences with depression she said it was too hard for her to count this and she did not want to discuss it I suspect there may have been other times that she has struggled with depression including possibly these past few years.

26. According to the applicants' submission, on this basis the first named applicant is a person to whom Australia owes protection obligations.

27. According to the applicants' submission they also fall within the Minister's guidelines for seeking his discretion pursuant to section 417 of the Act. In respect of the third named applicant [Mr B] the submission cites a submission of the Department of Immigration and Citizenship to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the *Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009*:

    There will be a very small group of people under the age of 18 who will no longer have direct access to Australian citizenship should this amendment [to section 219(5) of the Australian Citizenship Act 2007] proceed. It is anticipated that any such people with exceptional circumstances would appropriately be accommodated under the Migration Act 1958 (the Migration Act), if necessary, by way of Ministerial Intervention powers available under the Migration Act.

28. On this basis the applicants submit that [Mr B] in one of those children referred to by the Department as no longer having direct access to Australia citizenship following the September 2009 amendments to the Australian Citizenship Act 2007 and that, in accordance with the Minister's intention as evidenced by the Department, he is entitled to be considered for the grant of permanent residence through the exercise of Ministerial Intervention powers.

29. According to the applicant's submission the situation of the first named applicant amounts to exceptional circumstances because of her previous depression and the fact that she will not receive assistance in Brazil. It is submitted that she and family fall through the 'legislative cracks'. It is further submitted that the use of the Minister's discretion is not only appropriate in circumstances such as those of the applicant, but necessary for correct and proper administrative decision making.

30. According to the applicants' submission the circumstances of the case are compassionate and compelling. They are exceptional in that the first named applicant and her family are currently resident in Australia and have lived here for almost six years. According to their submission this is not an instance in which the applicants are merely attempting to circumvent the migration legislation. It is a situation where a woman's mental health and also the health of her husband and child is at substantial risk of irreparable harm. It is also a situation where the happiness and financial capacity of an Australian citizen and her partner will be significantly affected.

31. The submission states that the first named applicant is a person to whom Australia owes protection obligations as she will be denied the capacity to subsist if she is forced to return to Brazil due to her current and prospective mental health. She fears that she will suffer in Brazil due to her membership of a particular social group – namely people who have a mental illness or disorder. According to the submission there is no assistance for people such as the first named applicant in Brazil, and accordingly her fear is well founded given her previous experience. The submission again refers to the report of [Dr A] in its conclusion that the applicant is likely to either develop Major Depressive Disorder and experience worsened anxiety which will make her very vulnerable for on-going psychological problems if she were to return to Brazil.

32. The submission goes on to state that the matter involves a decision which is probably more appropriate for the Minister and requests that the delegate refuse the application to enable a review of that decision by the Tribunal and ultimately enable the applicant to seek the exercise of Ministerial discretion pursuant to s.417 of the Act.

33. Also provided with the visa application is the statement of the first named applicant dated [in] August 2011 according to which she has been advised by a clinical psychologist that she suffers from anxiety disorder and has suffered from serious depression in the past; that in Brazil when she is depressed there is nobody to help her; and that she fears that if she goes back to Brazil her anxiety will worsen and her depression will come back and she will face significant economic hardship which will threaten her ability to survive due to her mental health.

34. Also provided in support of the visa application is a copy of the psychologist report of [Dr A] in respect of the first named applicant.

35. By letter dated [in] December 2011 the Tribunal wrote to the applicants advising that the Tribunal had considered the material before it but was unable to make a favourable decision on that information alone, and inviting the applicants to appear before the Tribunal to give evidence and present arguments relating to the issues arising in their case.

36. By letter dated [in] December 2011 the applicants' representative wrote to the Tribunal advising that the applicants wish to waive their right to a hearing and requesting that the Tribunal come to a decision "based on the papers". The letter reiterates the intention of the

applicants to seek the Minister for Immigration and Citizenship's discretionary intervention and possible grant of permanent residency pursuant to s.417 of the Act.

FINDINGS AND REASONS

37. The applicants claim to be citizens of Brazil and the Tribunal has before it copies of their Brazilian passports (DIAC file – folios not numbered). Therefore, for the purposes of the Convention the Tribunal has assessed the applicants' claims against Brazil as their country of nationality.

38. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is 'well-founded' or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all of the allegations made by an applicant (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70). The High Court has emphasized in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 and *Guo*, referred to above, that the law requires that the Minister (or this Tribunal, on review) must be 'satisfied' that a person is a refugee.

39. With regard to the evidence before it, the Tribunal has considered the claims of the first named applicant to fear persecution in Brazil for reason of her membership of a particular social group of people who have a mental illness or disorder.

40. The Tribunal has considered whether 'people who have a mental illness or disorder' constitute a particular social group within the meaning of the Convention. The phrase "membership of a particular social group" is indeterminate. It is impossible to define the phrase exhaustively and pointless to attempt to do so. **(***Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 259, per McHugh J.**)** It is not generally possible to define '*absolute*' particular social groups, because what constitutes a particular social group in one society at any one time may not in another society or at another time. The emphasis is on whether or not a particular social group exists in the context of a *particular* society.

41. *Applicant A's case* remains the leading judgment on particular social group. After reviewing statements made in that case, Gleeson CJ, Gummow and Kirby JJ in the joint judgment in *Applicant S v MIMA* summarised the determination of whether a group falls within the Article 1A(2) definition of "particular social group" in this way:

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". As this Court has repeatedly emphasised, identifying accurately the "particular social group" alleged is vital for the accurate application of the applicable law to the case in hand. **(***Applicant S v MIMA* (2004) 217 CLR 387 at [36] per Gleeson CJ, Gummow & Kirby JJ.)

42. Justice McHugh in *Applicant S* summarised the issue in broadly similar terms:

To qualify as a particular social group, it is enough that objectively there is an identifiable group of persons with a social presence in a country, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle. **(** *Applicant S v MIMA* (2004) 217 CLR 387 at [69] per McHugh J.**)**

43. *Applicant S* also establishes that there is no requirement of a recognition or perception within the relevant society that a collection of individuals is a group that is set apart from the rest of the community.

44. A particular social group is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society. **(***Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 per Dawson, McHugh and Gummow JJ.**)** It was stated in *Applicant A*:

The adjoining of "social" to "group" suggests that the collection of persons must be of a social character, that is to say, the collection must be cognisable as a group in society such that its members share something which unites them and sets them apart from society at large. The word "particular" in the definition merely indicates that there must be an identifiable social group such that a group can be pointed to as a particular social group. A particular social group, therefore, is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society. **(***Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 241 per Dawson J.**)**

45. The use of [the term "membership"] in conjunction with "particular social group" connotes persons who are defined as a distinct social group by reason of some characteristic, attribute, activity, belief, interest or goal that unites them. If the group is perceived by people in the relevant country as a particular social group, it will usually but not always be the case that they are members of such a group. Without some form of internal linking or unity of characteristics, attributes, activities, beliefs, interests or goals, however, it is unlikely that a collection of individuals will or can be perceived as being a particular social group. Those indiscriminately killed or robbed by guerillas, for example, are not a particular social group. **(***Applicant A & Anor v MIEA & Anor (1997)* 190 CLR 225 at 264 -265 per McHugh J.**)**

46. Justice Gummow agreed with the statement in *Ram*:

There must be a common unifying element binding the members together before there is a social group of that kind. When a member of a social group is being persecuted for reasons of membership of the group, he is being attacked, not for himself alone or for what he owns or has done, but by virtue of his being one of those jointly condemned in the eyes of their persecutors, so that it is a fitting use of language to say that it is 'for reasons of' his membership of that group. **(***Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 285, citing *Ram v MIEA & Anor* (1995) 57 FCR 565 at 569.)

47. Based on a consideration of the evidence and law before it the Tribunal is not satisfied that people with a mental illness or disorder in Brazil constitute a particular social group within the meaning of the Convention.

48. The Tribunal considers that people who have a mental illness or disorder are not an identifiable group of persons with a social presence in Brazil, set apart from other members of that society, and united by a common characteristic, attribute, activity, belief, interest, goal, aim or principle. (*Applicant S v MIMA*). The Tribunal considers that people with mental illnesses or disorders comprise a large and diverse proportion of a given society, and that they share no particular common characteristic. On the contrary people with mental illnesses or disorders may have a wide range of conditions, differing enormously in severity, symptoms, attributes, and treatment needs.

49. The Tribunal finds that people with a mental illness or disorder in Brazil do not comprise a particular social group within the meaning of the Convention.

50. The Tribunal further does not accept that the harm which the applicants fear if they return to Brazil amounts to persecution within the meaning of the Convention.

51. It is well established law that persecution within the meaning of the Convention involves a discriminatory element, and that whether or not conduct amounts to persecution in the Convention sense does not depend on the nature of the conduct but on whether it discriminates against a person or persons because of their race, religion, nationality, political opinion or membership of a particular social group. (*Applicant A & Anor v MIEA and Anor* at 258)

52. It is also accepted law that the discriminatory element of persecution involves an element of motivation on the part of the persecutor. In *Ram v MIEA & Anor* (1995) 57 FCR 565 at 568 Burchett J, stated:

    Persecution involves the infliction of harm, but implies something more: an elements of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.

53. It follows that the element of motivation is implicit in the concept of persecution itself and is expressed in the phrase “for reasons of” contained in the Convention definition of a refugee. Where the harm feared is not directed at the applicant or a group to which the applicant belongs, for a Convention reason, no persecution is apparent for the purposes of the Convention.

54. The harm which the first named applicant claims to fear is a denial of the capacity to subsist because her mental illness will prevent her from being able to work and care for herself and her family. This harm does not amount to persecution because it does not involve conduct which discriminates against the applicant for a Convention reason. Nor does it contain the element of motivation implicit in the meaning of persecution within the Convention. It is not harm directed the applicant or at a group to which the applicant belongs, and does not, therefore, amount to persecution for the purposes of the Convention.

55. The secondary applicants have not made claims to fear persecution in Brazil and are applicants based on their membership of the family unit of the first named applicant.

CONCLUSIONS

56. The Tribunal is not satisfied that any of the applicants is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

Request for Ministerial Intervention

57. As noted above the applicants have indicated that they wish to seek the discretionary intervention of the Minister pursuant to s.417 of the Act. The Tribunal has considered whether this is an appropriate case to refer to the Department for consideration by the Minister pursuant to s.417 which gives the Minister a discretion to substitute for a decision of the Tribunal another decision that is more favourable to the applicant, if the Minister thinks that it is in the public interest to do so.

58. The applicants have provided detailed written submissions in respect of their circumstances and these are set out above.

59. The Tribunal has considered the applicants' case and the ministerial guidelines relating to the discretionary power set out in PAM3 'Minister's guidelines on powers (s345, s351, s391, s417, s454 and s501J)' and finds that this is an appropriate case to refer to the Minister for the Minister to determine whether to exercise his discretion to intervene pursuant to s.417 of the Act.

DECISION

60. The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.