

071678919 [2007] RRTA 317 (21 December 2007)

DECISION RECORD

RRT CASE NUMBER: 071678919

COUNTRY OF REFERENCE: Timor Leste

TRIBUNAL MEMBER: David Young

DATE DECISION SIGNED: 21 December 2007

PLACE OF DECISION: Melbourne

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

In accordance with s.431 of the *Migration Act 1958*, the Refugee Review Tribunal will not publish any statement which may identify the applicant or any relative or dependant of the applicant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

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

The applicant, who claims to be a citizen of Timor Leste, arrived in Australia with his wife and children, who are included in the present application. He applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by registered letter. The applicant applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act and that the Tribunal has jurisdiction to review the delegate's decision under s.411(1)(c) of the Act.

RELEVANT LAW

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.

Subsection 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) 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 Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

Australia is a party to the Refugees Convention and the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention 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.

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) 205 ALR 487 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition.

First, an applicant must be outside his or her country.

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.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

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.

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.

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.

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

The Tribunal has before it the Department's file, which includes the protection visa application and the delegate's decision record.

In his Protection Visa application, the applicant claimed that he left Timor Leste "...due to the unrest and anarchy that was reigning after the events of April 2006." He claimed that his "real reason" for entering Australia on a valid visa was to "...escape the troublesome East Timor."

The delegate rejected the application on the basis that it did not disclose any Convention reason for the applicant's claimed fear of persecution if he returned to Timor Leste, and there was adequate state protection available to the applicant.

The applicant lodged an application for review of the primary decision with this Tribunal. He provided no supporting submissions or evidence.

The Tribunal wrote to the applicant advising that it had considered all of the material before it relating to his application but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing. The applicant did not respond to that invitation. The applicant did not attend the hearing or contact the Tribunal to explain his failure to attend.

The Tribunal wrote to the applicant, noting that he had not provided any new submissions or evidence to the Tribunal in support of his claims, had not responded to its invitation to a hearing, and had not appeared at that hearing. In these circumstances, it invited him to provide additional information pursuant to s.424 of the Act, and to comment on adverse information, including independent country information, pursuant to s.424A of the Act. Copies of all of the independent country information referred to in the letter were enclosed.

After withdrawing his review application and then rescinding that withdrawal, the applicant responded to the Tribunal's invitations under ss.424 and 424A of the Act.

In his response, the applicant made very general claims about his safety, and sought to explain the delay in lodging his Protection Visa application. He also queried why a DFAT travel advisory suggested that Australians defer unnecessary travel to Timor Leste, while other sources indicated that citizens could return safely.

The Tribunal again wrote to the applicant, advising that it had considered all the material before it relating to his application but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing. Due to the unavailability of an interpreter in the applicant's preferred language, the applicant agreed to defer the hearing

A video hearing was held, at which oral evidence was given by the applicant, assisted by an interpreter.

The Tribunal explained the relevant law and the issues to be decided. The applicant, who is a professional, indicated that he understood.

The applicant said that he travelled to Australia with his family on a valid visa because of the disturbances in Timor Leste at that time. He claimed that he and his family "...were refugees

at Dili airport” at that time. Asked to explain what he meant, he said that the Timor Leste authorities were unable to guarantee his safety at the time. The Tribunal asked whether others were at risk, or only him and his family. He replied that all of the citizenry was in danger, as the police and military were engaged in armed conflict on the streets. He was not being specifically targeted, and was at no greater risk than anyone else; it was a general threat. The Tribunal asked for how long this situation had been continuing. The applicant said that it was a short-term conflagration, and “...everybody was running for safety.” His family took refuge at the airport encampment. They were invited by relatives in Australia to travel to Australia to stay with them, and so the applicant and his wife and children flew into Australia.

The applicant claimed that there was no protection available from the armed forces or police, because they were preoccupied with fighting each other, leading to a “...general lack of safety.”

The Tribunal asked the applicant why exactly he feared returning to Timor Leste. He said that he was not convinced that the country was safe. He pointed to the presence of a multinational peacekeeping force and a large contingent of Australia Defence Force personnel. The Tribunal suggested that their presence, coupled with the end of the skirmishing between the Timor Leste police and armed forces, may restore order and public safety. The applicant agreed that that was so, but asked what would happen when the international forces left Timor Leste. The Tribunal declined to speculate.

The applicant said that he had not come to Australia to work, and pointed out that he had fled Timor Leste on two prior occasions. He conceded that he had also returned voluntarily to Timor Leste on both occasions.

The applicant said that he may experience resentment and envy from people in Timor Leste because he had lived in Australia for so long, and “...they could kill me.”

The applicant said that he had withdrawn his review application because he felt frustrated by his and his family’s living conditions. They were living in separate locations, and on limited resources, and so he decided to return to Timor Leste. The Tribunal queried why someone who claimed to fear death if he returned to his homeland would decide to return there simply because he was experiencing some domestic stresses in Australia. The applicant said that he would rather face a bullet than continuing stress.

INDEPENDENT COUNTRY INFORMATION

CX181234: EAST TIMOR:Travel advice East Timor, Australia: Department of Foreign Affairs and Trade (DFAT), 27 June, 2007, , http://www.smartraveller.gov.au/zw-cgi/view/Advice/East_Timor
Added: 18/07/2007

Site: http://www.smartraveller.gov.au/zw-cgi/view/Advice/East_Timor, accessed on 18 July, 2007

Source: Australia: Department of Foreign Affairs and Trade (DFAT)

EAST TIMOR: Travel advice East Timor

This advice has been reviewed and reissued. It contains updated information in the Summary and under Safety and Security: Civil Unrest/Political Tension (possible violence in the period surrounding the elections on 30 June 2007). The overall level of the advice has not changed.

Summary We advise you to reconsider your need to travel to East Timor at this time because of the volatile security situation and the risk of violent civil unrest. The situation could deteriorate further without warning. There is a possibility that Australians and Australian interests may be specifically targeted. If you decide to travel to East Timor, you should avoid all unnecessary movement at night and exercise extreme caution. East Timor's parliamentary elections were held on 30 June 2007. Recent credible reports indicate that politically motivated violence could occur in the period surrounding the elections. While violence could occur anywhere at any time in East Timor, you should exercise extreme caution around internally displaced people's camps (IDPs) and outside of Dili. During this time, there is a heightened risk of demonstrations and other public protest activity which could turn violent and deteriorate without warning. You should avoid any demonstrations, street rallies and public gatherings as they may turn violent and you could get caught up in attacks directed at others. Australians should avoid travel to the Viqueque district following election-related disturbances over the weekend 2-3 June 2007. Violent disturbances have also occurred in other districts and provincial centres. Violent civil unrest has occurred in several areas of Dili, including in the vicinity of Dili's Comoro airport. The areas around internally displaced people's camps, near Comoro market and Bairo Pite have been subject to ongoing violence which could break out without notice. You should exercise extreme caution if passing through these areas. There have been continuing incidents of gang-related violence, robbery, arson and vandalism in Dili. Australians and other foreigners have been caught up in recent incidents of armed robbery and assault. Some gangs in Dili have attacked cars with potentially lethal stones and darts fired from slingshots, particularly during the early evening and at night. You should avoid using local taxis. You should also avoid armed irregular groups, including martial arts groups, both in the districts and in Dili. Credible reports suggest Australians may be targeted at places known to be frequented by foreigners, including hotels, bars, nightclubs and restaurants. Staff of the Australian Embassy have been advised to take additional practical security measures, and avoid all unnecessary local travel, particularly at night. Demonstrations can occur at or near symbols and institutions of the Government of East Timor, including the Palacio do Governo (government buildings), the Court, the Prosecutor General's office, the Presidential Palace, the National Parliament and houses belonging to prominent politicians. You should closely monitor the media and other local information sources for information about possible new safety or security risks. Because of the uncertain security situation, we strongly recommend that you register your travel and contact details with us, so we can contact you in an emergency. Be a smart traveller. Before heading overseas: organise comprehensive travel insurance and check what circumstances and activities are not covered by your policy subscribe to this travel advice to receive free email updates each time it's reissued.

CX161551: EAST TIMOR: Returning Timorese refugees not in danger, Australian police say, Undefined, 12 September, 2006, Added: 14/09/2006

Email: UNMIT Daily News Review
12 Sep 2006

EAST TIMOR: Returning Timorese refugees not in danger, Australian police say

Australian police in East Timor believe a group of refugees forced to return to Dili will not be in any serious danger. Thirty-seven East Timorese flew out of Darwin yesterday after their three-month visas expired. They had sought asylum at the height of East Timor's unrest in May, with many losing their homes in the violence and still fearing for their safety. But the Commander of Australian police in Dili, Steve Lancaster, says despite sporadic incidents of

violence, there is no reason for any to feel in danger. "There's a vast area in Dili that is safe for people to come home for most Dili people, and the people who seem to be getting hurt are those who are actually engaging in the gang fights or just wanting to get involved," he said. "If those who choose to stay away, they do, they can find those safe areas to go."

Reinado negotiations

Meanwhile, authorities in East Timor have been in communication with the former rebel leader Alfredo Reinado who is still on the run from jail. International police believe Reinado and many of the other 56 prisoners who escaped from prison last month are hiding in the mountains behind Dili. Commander Lancaster says authorities have followed up countless leads on the prisoners' whereabouts only to arrive somewhere and find they have already gone. But he says Timorese authorities have been in negotiations with Reinado. "He has been in discussions with other agencies and the Government and, as you're well aware, he's certainly been putting himself in the media spotlight as well," he said. "All we can actually do is just actively encourage him to bring himself in and discourage him from getting involved in any violent or any political, sort of, options." (ABC)

CX180263: EAST TIMOR:E Timor observers cheer smooth elections but fear trouble ahead, South China Morning Post, 2 July, 2007, Added: 3/07/2007

Email: ETAN

Source: South China Morning Post

EAST TIMOR: E Timor observers cheer smooth elections but fear trouble ahead

Fabio Scarpello in Dili

East Timor has emerged unscathed from what many feared would be an election day marred by violence - but as vote counting got under way yesterday, many feared the most dangerous part of the electoral process was still ahead.

There were few incidents to sully the election day on Saturday that saw East Timorese choosing between 14 parties to form the 65-member parliament. Officials said the turnout was good, but it appeared to be lower than for the recent presidential elections, when around 80 per cent of the 548,000 registered voters took part.

In Dili, the head of the European Union Election Observation Mission was delighted by what he saw but warned that trouble could emerge as a result of recently changed counting procedures.

"I visited four voting stations and I am happy with what I saw," said Jose Javier Pomes Ruis, also a member of the European Parliament.

"Our opinion is that East Timorese want peace and democracy and that, after the two rounds of the presidential elections, the system works much better," he said, adding that the assessment was provisional.

"But we all agree the most difficult stage is the counting procedure."

Mr Ruis questioned the wisdom of the change in the counting procedure, recently pushed through by the country's main party, Fretilin.

"I do not know why Fretilin wanted to change the previous system, but I am worried that the new one could cause problems," he said.

Ballot boxes from the polling stations were transferred to district counting centres. During the presidential elections, ballots were counted instead at the polling stations.

"Our opinion is that the ballots should have been counted at the polling stations in front of the representatives of the various parties and election officials," Mr Ruis said.

"It would have been important for voters also. They need to see the counting taking place where they have actually voted."

Some commentators have said that the change could make it more difficult for people to accept the results if different to their expectations.

Last night, with roughly 10 per cent of the vote counted, Fretilin led the National Congress for East Timor Reconstruction (CNRT), a new party led by former president Xanana Gusmao, by 5,100 votes, at 32 per cent, the Nation Election Commission said. The CNRT had 23 per cent.

Officials say that preliminary results may be known by late today or tomorrow, but final results may not be known until next week.

Political analysts have predicted a close race between Fretilin and CNRT. Among the others, the Democratic Party is considered the strongest outsider.

However, no party is expected to win an absolute parliamentary majority required to govern, and it is very likely that the next government will be the result of a coalition.

Some 500 foreign monitors and 3,000 peacekeepers oversaw the voting at hundreds of polling stations.

Violence was recorded only at one centre in Viqueque district, close to where two campaign workers were shot dead after a rally last month.

FINDINGS AND REASONS

In both his protection visa application and his review application the applicant described himself as a national of Timor Leste. He arrived in Australia on a Timor Leste passport. For the purposes of the Convention, the Tribunal has assessed the applicant's claims against Timor Leste as his country of nationality.

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 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 applicant's claims, discussed above, are of a very general character, and are not specific to him or his family. He expresses a generalised fear of violence and political unrest in Timor Leste, coupled with a fear that the authorities and their international backers will be unable to afford him protection.

The Tribunal accepts that Timor Leste is a fledgling nation, still struggling to extricate itself from a turbulent past and establish the civic institutions, physical infrastructure and social capital that will assure its future as a viable secular democracy. It also accepts that during this painful and convulsive transition process, there will be sporadic outbreaks of violence and civil unrest, and that innocent citizens may well have good cause to fear for their safety from time to time.

However, the Tribunal is concerned to establish only whether the specific applicant before it meets the Convention definition of a refugee, and not with larger and more general questions of national security and stability in their country of nationality. That is not to suggest indifference or callousness on the Tribunal's part; merely that its jurisdiction is limited by the Act, the Convention and the Protocol.

Having examined the applicant's claims carefully, the Tribunal can find only one Convention-related claim, viz. that he fears persecution by other citizens because of their envy that he has lived in Australia for a long time. The Tribunal accepts this could plausibly be regarded as fearing persecution by reason of the applicant's membership of a particular social group. However, the Tribunal has seen no evidence that returnees in the applicant's position face a real chance of persecution or serious harassment, and some independent country information that clearly indicates the reverse (see documents reproduced above). Moreover, the cessation of hostilities between the Timor Leste armed forces and police, the completion of the general elections, and the arrival of an international peace-keeping force, all indicate that calm and order have been effectively restored, and that adequate state protection is available to the applicant.

The applicant conceded that his fear that state protection would not be available to him was also generalised, and that there was no suggestion that it would be withheld from him for any Convention reason.

In the final analysis, the applicant's claims are couched in generalities, and based on fears borne of a brief and unusual period of political turmoil in Timor Leste in mid-2006. Those conditions no longer obtain, and the Tribunal can find no evidentiary basis for the applicant's claimed fear of harm were he and his family to return to Timor Leste.

As the Tribunal noted above, the relevant facts of the individual case must be supplied by the applicant himself or herself, in as much detail as is necessary to enable the decision maker to establish the veracity and merits of the claim. Having carefully considered the available evidence, the Tribunal is not satisfied that the applicant has suffered any harm in the past for any Convention reason, or faces a real chance of persecution or serious harm in the future for reason of his membership of a particular social group, or any other Convention ground. Accordingly, the Tribunal is not satisfied that the applicant has a well-founded fear of persecution in Timor Leste, his country of nationality, for any Convention reason.

CONCLUSION

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant does not satisfy the criterion set out in s.36(2) of the Act for a protection visa.

DECISION

The Tribunal affirms the decision not to grant a protection visa.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act 1958*.

Sealing Officer's I.D. Inward