

**0901657 [2009] RRTA 526 (11 June 2009)**

**DECISION RECORD**

**CATCHWORDS:** Review of Protection visa refusal - Indonesia - non-attendance at Tribunal hearing - December 2004 Asian Tsunami

**RRT CASE NUMBER:** 0901657

**DEPT REFERENCE:** CLF2008/166988

**COUNTRY OF REFERENCE:** Indonesia

**TRIBUNAL MEMBER:** Danica Buljan

**DATE:** 11 June 2009

**PLACE OF DECISION:** Melbourne

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

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**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**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship (the delegate) to refuse to grant the applicant a Protection (Class XA) visa under section 65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Indonesia, arrived in Australia [in] October 2008. [In] December 2008 he lodged an application for a Protection (Class XA) visa with the Department of Immigration and Citizenship (the Department). [In] February 2009 the delegate refused to grant the applicant a Protection visa and notified the applicant of the decision and his review rights by letter posted on the same date.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. [In] March 2009 the applicant applied to the Refugee Review Tribunal (the Tribunal) for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under subsection 411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under section 412 of the Act.

### **RELEVANT LAW**

6. Under subsection 65(1) of the Act 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, in this case 31 December 2008, although some statutory qualifications enacted since then may also be relevant.
7. 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. The 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees respectively: subsection 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* (the Regulations).

### **Definition of 'Refugee'**

8. 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.

9. 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.

10. 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.

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

12. Second, an applicant must fear persecution. Under subsection 91R(1) of the Act persecution must involve “serious harm“ to the applicant (subsection 91R(1)(b)), and systematic and discriminatory conduct (subsection 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: subsection 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.

13. 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.

14. 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: subsection 91R(1)(a) of the Act.

15. 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.

16. 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.

17. 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**

18. The Tribunal has had regard to the following material:

T1 - RRT case file 090 1657, folio numbered 1-24.

D1 - Departmental file CLF2008/166988, folio numbered 1-66.

The Tribunal has also had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

### **The Protection Visa Application**

19. According to information provided in the Protection visa application, the applicant was born in [town deleted in accordance with s431(2) of the Migration Act as this information could identify the applicant], Indonesia [in] 1974. In his application the applicant stated that he belongs to the Chinese ethnic group and that he is a Christian. He also stated that he speaks Indonesia and Mandarin and that he reads and writes Indonesian, Mandarin and English. The applicant also stated that he has never married. He further stated that from June 1977 to May 1998 he lived in Jakarta, that from May 1998 to December 2004 he lived in Aceh, Sumatra-Utara in Indonesia. In addition, the applicant stated that he was educated from 1980 to 1992, at which time he completed his secondary education in Indonesia. He also stated that he was self-employed in Jakarta as a manager from June 1997 to June 1998, in Aceh from June 1998 to November 2004 and then as a manager in Medan, Indonesia from June 2005 to October 2008.

20. The applicant stated in his Protection visa application that he left Indonesia [in] October 2008 and travelled to Australia on a visitor visa valid to [date deleted: s431(2)] January 2009. In addition, the applicant stated that he travelled to Australia as the holder of an Indonesian passport that was issued [in] November 2007 and valid to [date deleted: s431(2)] November 2012.

21. The applicant stated that he was seeking protection in Australia so that he does not have to go back to Indonesia. In answer to the question "*Why did you leave that country?*" he stated:

"I left my home country because few reasons. I fear founded fear to go back to my country because for my safety and freedom.

Since June 1977 I live in Jakarta. I left Jakarta after Riot May 1998 and moved to Aceh. On December 2004 Tsunami came destroyed everything belong [sic] to me so I had to left that's place [sic] and moved to Medan.

I lived in “[location]” Jakarta when the Riot came on May 1998. It was very scary and terrible thing had happened, they came destroyed everything, the [sic] raping the girls, they were screaming but nobody tried to stopped it even no one authority came every authority disappear seem No Law at all, they killing, raping, robing [sic] etc. I was scare, sad and trauma because what kind of country, we work hard pay taxes but no one protect our rights not even tried it. That's why I moved to Aceh but bad luck Tsunami happened. I lost everything I came to Australia hoping find my safety and freedom. (I will send more details later on).

22. In answer to the question “*What do you fear may happen to you if you go back to that country?*” the applicant stated: “I fear for my safety and freedom”. In answer to the question “*Who do you think may harm/mistreat you if you go back?*” the applicant stated: “The extremist people and jealousy people”. In answer to the question “*Why do you think this will happen to you if you go back?*” the applicant stated: “Because they are sick in their head”.

23. In answer to the question “*Do you think the authorities of that country can and will protect you if you go back? If not, why not?*” the applicant stated:

“Not at all because I know from my experiences May 1998 No [sic] one authority came even tried to stop barabarian act, killing, raping, robbing etc.

A lot of police, army and authority because Jakarta capital city also a lot of overseas embassy all they knew and witnessing this happened but they were not able to do anything to protect the people for Humanitarian Reason”.

24. Apart from extracts of the applicant’s expired Indonesian passport, the applicant did not submit any other evidence in support of his Protection visa application.

### **The Primary Decision**

25. [In] February 2009 the delegate refused the Protection visa application (D1, f.37-64). The delegate found that the applicant had provided very little detail regarding his claimed persecutors or the detailed incidences which caused him to fear harm for a Convention-related reason. The delegate noted that there was nothing to indicate that the applicant had been personally targeted during the 1998 riots for a Convention-related reason. In relation to the applicant’s claims regarding the 2004 Asian tsunami, the delegate found that the applicant’s loss of his possessions was a personal misfortune unrelated to a Convention ground. In addition, the delegate noted that there was nothing in the evidence before her to suggest that the Indonesian authorities would be unwilling or unable to protect the applicant for a Convention reason.

26. Accordingly, the delegate found that a Convention ground was not the essential and significant reason for the harm the applicant feared and, therefore, she found that the applicant does not fear persecution for a Convention reason and he was not a person to whom Australia has protection obligations.

### **The Review Application**

27. [In] March 2009 the review applicant applied to the Tribunal for review of the delegate’s decision (T1, f.8-11). No other evidence was submitted in support of the review application.

28. The matter was constituted to the Presiding Member [in] March 2009 (T1, f.17).

29. By letter dated [in] March 2009 the Tribunal wrote to the applicant advising that it had considered all the material before it relating to his review application, but it was unable to make a favourable decision on that information alone. Accordingly, the applicant was invited to appear before the Tribunal [in] May 2009 to give oral evidence and present arguments in support of his claims (T1, f.19-22).

### **The Tribunal Hearing**

30. The invitation to appear before the Tribunal was sent to the last address for service provided by the applicant in connection with the application for review. The Tribunal also has evidence indicating the date of dispatch in accordance with section 441A of the Act (T1, f.22). However the applicant did not appear before the Tribunal on the day and at the time and place at which he was scheduled to appear, namely [in] May 2009. Nor did he contact the Tribunal to explain his failure to attend or to seek a postponement of the hearing. In these circumstances, and pursuant to section 426A of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before it.

### **FINDINGS AND REASONS**

#### ***What is the Applicant's Country of Nationality and is he outside it?***

31. The applicant claims to be a national of Indonesia and arrived in Australia on an Indonesian passport. The Tribunal accepts that the applicant is an Indonesia national and, for the purposes of the Convention, has therefore assessed his claims against Indonesia as his country of nationality.

#### ***Does the Applicant have a well-founded fear of persecution for a Convention related reason?***

32. The Tribunal observes that 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 he satisfies all of the required statutory elements. 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.)

33. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make findings of fact on the claims he or she has made. This may involve an assessment of the applicant's credibility and, in doing so, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.

34. On the other hand, as stated previously, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547). However, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* (1999) 93 FCR 220).

35. In relation to whether the applicant is entitled to protection in Australia as a refugee the Tribunal notes that the Convention requires that a refugee must have a well-founded fear of persecution for a Convention reason, namely, for reasons of *race, religion, nationality, membership of a particular social group or political opinion*.

36. The Tribunal accepts that the applicant is of Chinese ethnicity, a Christian and that he was born in [location deleted: s431(2)], Indonesia. The applicant claimed that he was living in Jakarta during the "Riot" that came in May 1998 and that he witnessed people being robbed, raped and killed without receiving any protection from the government. He stated that he subsequently moved to Aceh, where he claimed that he lost everything as a result of the December 2004 Asian tsunami.

37. The Tribunal has taken into account the applicant's claims, but observes that the applicant's claims are very general and lacking in detail in significant respects. For example, the applicant did not provide any details regarding the date when the alleged riot took place in May 1998 or the identity of those who were involved on the attacks on members of the general population. Nor did he set out any details regarding any incidents during these events when he was targeted by the alleged rioters in May 1998. In addition, the applicant did not provide any particulars in relation to why he believes the government failed to act on this occasion to protect its citizens during such riots. As a result, the applicant has provided little detail regarding any specific instances of harm. Accordingly, given the limited evidence before it, the Tribunal is not satisfied that the applicant was involved in or affected by the riots that allegedly took place in Jakarta in May 1998. Nor is the Tribunal satisfied that the Indonesian government failed to take appropriate steps to protect its citizens during these alleged events.

38. Similarly, whilst the Tribunal has had regard to the applicant's claim that he lost everything during the December 2004 Asian tsunami, the Tribunal observes that the applicant has not identified who the perpetrators of the alleged persecution in this instance were, or what was the selective or discriminatory conduct that gave rise to the applicant's fear. Nor has he identified how the essential and significant reason for the harm the applicant fears is related to any of the Convention grounds of race, religion, nationality, membership of a particular social group or political opinion. As a result, the Tribunal is not satisfied that the applicant had to flee Indonesia for his own safety.

39. In the circumstances of the application before it, the Tribunal observes that the applicant has not provided the level of detail necessary to satisfactorily establish the relevant facts of his case. If the applicant had attended the Tribunal hearing it would have been possible for the Tribunal to investigate these matters in greater depth with him. However,

despite being advised by the Tribunal in writing [in] March 2009 that it was unable to make a favourable decision in his case on the basis of the information before it, the applicant failed to provide the Tribunal with any further information in support of his claims or to attend the Tribunal hearing to give evidence in respect of them.

40. Therefore, the Tribunal has insufficient evidence before it to be satisfied of the claims that have been made by the applicant and does not accept his claims. Based on the very limited information before it, the Tribunal is not satisfied that the essential and significant reason for the harm the applicant fears is related to any of the Convention grounds of race, religion, nationality, membership of a particular social group or political opinion. Nor is the Tribunal satisfied that the applicant was in any way denied the protection of the State or forced to flee Indonesia. In addition, the Tribunal is not satisfied that there is a real chance the applicant would suffer serious harm for a Convention-related reason should he return to Indonesia, now or in the reasonably foreseeable future.

41. Accordingly, the Tribunal is not satisfied that, looking to the reasonably foreseeable future, the applicant has a well-founded fear of persecution in Indonesia for a Convention-related ground.

## **CONCLUSION**

42. 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 subsection 36(2) of the Act for a Protection visa.

## **DECISION**

43. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) 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. prrt44