

**0801251 [2008] RRTA 86 (3 April 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0801251

**DIAC REFERENCE(S):** CLF2007/179161

**COUNTRY OF REFERENCE:** Indonesia

**TRIBUNAL MEMBER:** Hugh Wyndham

**DATE OF ORAL DECISION:** 2 April 2008

**DATE DECISION SIGNED:** 3 April 2008

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal remits the matter for reconsideration with the following directions:

- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
- (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and dependants of the first named applicant.

## **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 Indonesia, arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal for review of the delegate's decisions.
5. The Tribunal gave its decision on the review at the conclusion of the hearing. The following are the reasons for that decision.
6. 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 applicants have made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

7. 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.
8. 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).
9. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.
10. 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'**

11. 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.

12. 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 and *Applicant S v MIMA* (2004) 217 CLR 387.
13. 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.
14. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
15. 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.
16. 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.
17. 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.
18. 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.

19. 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.
20. 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**

21. 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.
22. The applicants appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Bahasa - Indonesian and English languages.
23. The applicants were represented in relation to the review by their registered migration agent, who attended the hearing.

### **Primary claims**

24. The first named applicant and the only one initially to make Convention-related claims. I will therefore refer to her henceforth as the applicant. She stated in her primary application that she was born in Indonesia. She had both primary and secondary education. She entered Australia with her family. In her primary application, she stated that she provided details of her work history.
25. A medical report revealed that the applicant has a severe disability.
26. The primary application was submitted apparently without the assistance of a professional adviser. In it, hand written claims were made that the applicant feared for her personal safety in Indonesia for reason of her ethnicity (Chinese). For the same reason, she did not believe that she would receive state protection. Other claims were made about life in Indonesia.

### **Oral claims and evidence**

27. All applicants attended the Tribunal hearing. Prior to the hearing, a submission was received from the applicant's adviser which repeated her previous claims and added claims in respect of her family – essentially to the effect that they would have difficulty re-adjusting to life in Indonesia.
28. The applicant stated that she had few family members in Indonesia and limited contact with them. Her husband had relatives in Indonesia, but some of his relatives had left the country. He said that others had not because they could not afford to. In addition to the matters raised

by the applicant, he said that in Indonesia, women were particularly vulnerable and, in the case of Chinese Indonesians, they could not rely on the police for protection or support.

## **FINDINGS AND REASONS**

29. I accept that the applicants are Indonesian citizens of Chinese ethnicity.
30. As I explained to the applicants at hearing, difficulty settling back into one's country of origin, whether as a child who has limited knowledge of the language or as an adult who might have difficulty finding work, is not normally, in the absence of another factor, a basis for the grant of a protection visa. Nothing presented to the Tribunal at hearing or elsewhere persuades me to take another view on this occasion. The claims made to the Tribunal to that effect in respect of the applicant's family I therefore reject.
31. Moreover, I would not be prepared to find in favour of the applicant at all on the basis of the claims actually made. Some of the claims made about life in Indonesia were fair, but involved matters which potentially affected all residents of Indonesia. There was no Convention nexus. As to claims regarding the treatment of Indonesians of Chinese ethnicity, nothing written or said by the applicants was persuasive that, on that ground alone, they faced persecution.
32. However, the Tribunal is required to make a decision taking into account any matter which clearly arises from the information before the Tribunal.
33. The country information set out in the delegate's decision highlights two matters. Firstly, "discrimination against persons with disabilities exists in Indonesia" and "support services...are poorly resourced". Secondly, discrimination and harassment of Chinese Indonesians continues, albeit at a lower level, and officials discriminate against them, for example in the issuing of marriage licences and other services.
34. The applicant is going to require support services because of her disability for the rest of her life. The country information cited in the Delegate's decision record, considered in its entirety, strongly suggests to me that her access to the limited services available could well be limited by her ethnicity. Thus, in addition to the discrimination she is likely to suffer in any event as a result of her ethnicity and in addition to the discrimination she is likely to suffer in any event as a result of her disability, there is a real chance that she would suffer further discrimination as a result of a combination of the two factors, in that her access to support services would be affected adversely for reason of her ethnicity. In her situation, this would involve a level of harm amounting to persecution.
35. I am satisfied, therefore, that there is a real chance of the applicant suffering harm amounting to persecution in Indonesia for reason of a combination of her ethnicity and her membership of a particular social group, namely people with a physical disability.
36. I find accordingly that the applicant has a well founded fear of persecution in Indonesia for a Convention reason.

## **CONCLUSIONS**

37. The Tribunal is satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant

satisfies the criterion set out in s.36(2)(a) for a protection visa and will be entitled to such a visa, provided she satisfies the remaining criteria.

38. I have dismissed claims made to the Tribunal by or on behalf of the other applicants. However, I am satisfied that they are the spouse and children of the first named applicant for the purposes of s.36(2)(b)(i). The fate of their application therefore depends upon the outcome of the first named applicant's application. They will be entitled to protection visas provided they satisfy the criterion set out in s.36(2)(b)(ii) and the remaining criteria for the visa.

## **DECISION**

39. The Tribunal remits the matter for reconsideration with the following directions:
- (i) that the first named applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention; and
  - (ii) that the other named applicants satisfy s.36(2)(b)(i) of the Migration Act, being the spouse and dependants of the first named applicant.

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. PRRT42