

0801698 [2008] RRTA 253 (13 June 2008)

DECISION RECORD

RRT CASE NUMBER: 0801698

COUNTRY OF REFERENCE: Indonesia

TRIBUNAL MEMBER: Lisa Ward

DATE DECISION SIGNED: 13 June 2008

PLACE OF DECISION: Perth

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Indonesia, in Australia on valid visa. His visa was cancelled
3. 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 letter. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Particular Social Group

19. The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... 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". ...

20. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be feared for reasons of the person's membership of the particular social group.

CLAIMS AND EVIDENCE

21. The Tribunal has before it the Department's file relating to the applicant. The Tribunal 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 applicant appeared before the Tribunal to give evidence and present arguments.
22. The applicant first arrived in Australia as the holder of a valid visa. Since that time he has held several substantive visas throughout the early 2000s.
23. Since the applicant has departed and returned to Australia several times throughout the early 2000s
24. The applicant's most recent visa was cancelled.

Protection visa application

25. The applicant applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa in the early 2000s. He claimed that Person A threatened his life in City O in the early 2000s, as Person A thought that he was after his girlfriend. He stated that he feared being killed or harmed by Person A if he returned to Indonesia. He claimed that Person A and his family are well known in Jakarta and that the authorities are 'one of his' and that he has the power to control them.

26. A statement made by the applicant was also lodged with the protection visa application, in which he states he 'will try and explain in detail the reason why I become illegal here in Australia'.
27. The application for protection was refused by the delegate.

Review application

28. The applicant applied to the Tribunal on 21 September 2007 for review of the delegate's decision.
29. The Tribunal wrote to the applicant and advised that it had considered all of the material which he had provided, but was unable to make a favourable decision based on that information alone. Therefore the Tribunal invited the applicant to give oral evidence and present arguments at a hearing.
30. The Tribunal received a written request from the applicant to postpone the hearing as he claimed that he needed more time to gather documents to support his case and to save money so that his agent could help him during the hearing. A Tribunal officer telephoned the applicant and advised that the request to postpone the hearing had been refused and the applicant should attend the hearing on the scheduled date.
31. The applicant's sworn evidence at hearing included the following, in summary:

[information about the applicant's sworn evidence amended in accordance with s.431 as it may identify the applicant].

- His family lives in Jakarta.
- He does not have any relatives living in Australia. He contacts his family in Jakarta each week. He usually buys an international calling vehicle.
- He studied in Australia in the early 2000s.
- In the early 2000s, he attended a function at a venue in City O. The function was put on by Person B and Person C, told him that Person A said that he wanted to assault the applicant as he thought that he had led to the break up in his relationship with Person D (Person A's partner). He did not see Person A at the function. He saw one of Person A's friends. He does not know the name of Person A's friend; he is the Vietnamese guy who is always with Person A.
- In 2003 Person D and Person A were in a relationship.
- He did not know Person A until he met him in City O.
- He knows Person A as he was Person D's ex-boyfriend. He is good friends with Person D's sibling, Person E. Person E and he have the same hobbies Person E and his family since the early 2000s.
- After the incident at the function, he telephoned Person A and asked him why he wanted to bash him. Person A said that it was over Person D. They decided to meet up several days after the incident. He went to the designated meeting

place and Person A started punching him. He ran to his vehicle and the police came. He told the police that nothing happened. A few friends were with him in the vehicle.

- In the early 2000s he was living with a housemate, Person F.
- In the early 2000s Person A departed from Australia He thinks that he was deported, but he is not aware of the reason why.
- In the early 2000s he overstayed his visa and was in Australia illegally. He stayed in Australia with the family of his friend, Person E.
- In the early 2000s he was granted another visa and he started working for a company.
- His friends in Jakarta tell him that if they see Person A, then Person A asks after the applicant.
- He has no right to reside in any other country.
- He misses his parent in Indonesia and he would like to visit her.
- He has discussed a solution to his problem with Person A with his father.
- He has relatives elsewhere in Indonesia. However relocating within Indonesia is of no help as Person A has a network of people who would help him throughout Indonesia.
- There is no guarantee that he will be safe elsewhere in Indonesia.
- He claims that he is a member of a particular social group which comprises of people threatened by Person A and his family.
- In the early 2000s he visited Jakarta on a few occasions and did not have any contact with Person A.
- On one occasion in the early 2000s he visited his parent in Jakarta. He claims that a few days into the visit Person A telephoned his home in Jakarta and disguised his voice to find out if he was there. He heard Person A say that, "He's in Jakarta, he's in Jakarta" and that is when he knew that it was Person A He says that he then moved from his family home to live with his relative, so that Person A could not find him.
- He said that even some of his closest friends did not know exactly where he lived in Jakarta. Therefore it is not that surprising that nothing happened to him during his visits to Jakarta since the 'incident'.
- If he returns to Jakarta he thinks that Person A, or his friends, will kill him because of Person D. Person A will find him and kill him.

- He has delayed making a protection visa application because he had a different visa and he did not know that a protection visa was available to him. He convinced DIAC to let him stay after he had overstayed one visa due to the incident at the function in City O. He sought advice from two agents and he was told that he did not meet the criteria for a particular visa. DIAC should have offered him a protection visa instead of the other visa he was granted.
- A number of his friends were married in Jakarta last year and he did not return for the weddings because of the threats made by Person A. He said that his friends told him that Person A attended some of the weddings.
- He would like the Tribunal to access the three statutory declarations which were included with his other visa application. The declarations were made by his friends Person D, Person E and Person G. The declarations were made by them to confirm what happened at the function in City O. The declarations were required as he was in Australia illegally when he applied for his visa. These declarations will support the fact that the incident did actually occur.
- He has relatives who are police in Indonesia and they do not think that moving to another province would protect him from Person A.
- Person A has contacts in City O as well. However he has never been bothered by Person A's contacts in City O, because his problem is too small.
- He does not know where Person A lives in Jakarta or what he is doing there. He heard that Person A came to Australia for a specific reason as he was in trouble with the law in Indonesia due to a violent incident. He does not know if anyone was injured or killed during this incident. Person A's sibling has been in jail a number of times and he has seen this on the news in Jakarta.
- He cannot work legally at the moment. So he cleans the house, which he lives in and he is working, earning several dollars per hour.
- He is afraid to go to Jakarta. There is nothing to hold him in City O. He wants to visit his parent in Jakarta.
- He is also concerned that family members in Jakarta may be harmed by Person A.
- Person A threatened Person E's sibling, Person G, and said that he would burn down their family home in Jakarta. As a result Person D and her parent visited Person A's family in Jakarta to see if the problem could be sorted out.

32. The Tribunal received a submission from the applicant which included a CD of the following articles written in Indonesian:

[information about the applicant's submission amended in accordance with s.431 as it may identify the applicant].

- Extract from an Indonesian news publication which the applicant states is about Person I (Person A's sibling);

- Extract from another Indonesian news publication which the applicant states is about a recent incident in Jakarta involving Person A;
- Extract from an additional Indonesian news publication which the applicant states are about Mafia in Indonesia and Person A's parent, Person J, is mentioned; and
- Photo of two men, which the applicant states are Person I and Person K

FINDINGS AND REASONS

Country of Reference

33. The applicant claims to be a national of Indonesia The Tribunal is satisfied on the evidence before it, including the applicant's passport that the applicant is outside the country of his nationality, namely Indonesia.

Applicant's claims

34. In essence the applicant claims that he is a member of a particular social group, namely people threatened by Person A and his family. The applicant claims that Person A threatened to kill or injure him as Person A thinks that the applicant was involved in the breakdown of his personal relationship with a mutual friend, Person D. The applicant claims that Person A's sibling is a well known in Jakarta. The applicant fears that he will be seriously harmed by Person A or his associates if he returns to Jakarta.

Credibility of the applicant

35. The applicant gave consistent evidence throughout the hearing. His evidence at the hearing was also consistent with the claims he made in his application for a protection visa. He gave evidence before the Tribunal in a straightforward manner.
36. The applicant requested that the Tribunal obtain the three declarations which were made by his friends Person D, Person E and Person G and provided to the Department. According to the applicant the declarations confirm what happened at the function in City O in the early 2000s The Tribunal has obtained the Department files relating to the applicant's visa application. The three declarations are not on the file obtained by the Tribunal. However, in any case the Tribunal accepts the applicant's version of what happened to him at the function in City O as he has been consistent about it throughout the review process.

Convention ground

37. As set out above, 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.
38. In this case, the applicant claims that he is a member of a particular social group (PSG), namely people threatened by Person A and his family.
39. A PSG must be identifiable by characteristics or attributes common to all members. However, the common attribute cannot be a common fear of persecution: *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225 at 242.

40. In this case the attribute linking the members together is the fact that they have been threatened by Person A and his family. Therefore the uniting characteristic is the fear of persecution. Having considered and applied the High Court's decision in *Applicant A*, the Tribunal is not satisfied that the applicant is a member of the PSG as claimed as by definition no such PSG exists.
41. Further on the facts before the Tribunal no other PSG arises in this case. The Tribunal accepts that the applicant was threatened by Person A or his agents. However the threat arose from a misunderstanding, on Person A's part, involving a female friend. The dispute in this claim is a private one between two people, namely Person A and the applicant. The Tribunal finds that the essential and significant reason for the threat of harm by Person A was not for any Convention-related reason.

Well founded fear of persecution

42. Further the Tribunal is not satisfied that the applicant has a well founded fear of persecution. For the reasons set out below, the Tribunal is not satisfied that there is a real chance of persecution in the reasonably foreseeable future should the applicant be returned to Indonesia.
43. By way of background, the applicant claims that the first time Person A threatened him was at a function in the early 2000s. At that time it is claimed that Person A, via a mutual friend, said that he wanted to assault the applicant, as he thought that he had led to the break up in his relationship with Person D. The applicant then telephoned Person A and suggested that they meet up to discuss Person A's concerns. They then met several days later. At the meeting the applicant claims that Person A started to assault him, so he fled the scene by vehicle. Since that time, the applicant claims that the only contact that he has had with Person A was when he thinks Person A called his family home in Jakarta while he was visiting. During this telephone call no threat was made against the applicant.

No past harm

44. Notwithstanding that Person A is said to have threatened the applicant several years ago, no harm or further threats have been made by Person A to the applicant. Further, the applicant has returned to Jakarta on three occasions since he claims Person A threatened him. The threats made by Person A did not prevent the applicant from returning to Indonesia since that time. Also, the applicant claims that some of Person A's 'contacts' live in City O, however there is no evidence that the applicant has ever been threatened or harmed by his contacts in City O.
45. The Tribunal notes that the applicant subjectively believes that there is a real chance of harm to him from Person A or his family, due to the claimed reputation of Person A's family in Indonesia. However the factual basis for this fear is not borne out as the applicant has already returned to Indonesia on a number of times and no harm has occurred to him.

Future harm

46. The facts of this case do not tend to support the applicant's claims that he would be killed or threatened if he returned to Indonesia. The applicant has already returned to Indonesia on three separate occasions since Person A threatened to harm or kill him and nothing has happened to the applicant to date. There is no evidence suggesting that his friends or family are aware of any threat made against him by Person A or his agents. The most that the applicant's friends pass onto him is that Person A asks about the applicant's whereabouts from time to time.

47. The Tribunal notes that while past events will often provide a reliable means of predicting future persecution, this will not always be the case. Where however, as in this case, there has been no substantial change in country conditions or the applicant's circumstances the fact that no past harm was suffered is a reliable guide for deciding if the applicant's fear of being persecuted for a Convention reason is well-founded.
48. Having regard to the real chance test, as set out above and the applicant's evidence, the Tribunal is not satisfied that there is a real chance that he would, for the essential and significant reason of his membership of a particular social group or any other Convention reason suffer serious harm if he returned to Indonesia now or in the reasonable foreseeable future.

CONCLUSION

49. In summary, the Tribunal is not satisfied that the applicant has a well founded fear of persecution in Indonesia for a Convention reason.
50. 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. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for 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. Iward

DECISION

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