

**071129159 [2007] RRTA 64 (28 March 2007)**

**DECISION RECORD**

**RRT CASE NUMBER:** 071129159

**DIAC REFERENCE(S):** CLF2006/141169

**COUNTRY OF REFERENCE:** Malaysia

**TRIBUNAL MEMBER:** Jonathon Duignan

**DATE DECISION SIGNED:** 28 March 2007

**PLACE OF DECISION:** Sydney

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

## **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 Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant 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 her review rights by letter.

The delegate refused the visa application as the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal for review of the delegate's decision.

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**

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.

Section 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.

The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion

of protection by that country. The international community is not under an obligation to provide protection outside the borders of the country of nationality if real protection can be found within those borders. Therefore, even if an applicant has a well-founded fear of persecution in their home region, the Convention does not provide protection if they could nevertheless avail themselves of the real protection of their country of nationality elsewhere within that country: *Randhawa v Minister for Immigration Local Government & Ethnic Affairs* (1994) 52 FCR 437 per Black CJ at 440-1.

This principle only applies to people who can genuinely access domestic protection, and for whom the reality of protection is meaningful. If relocation is not a reasonable option in the particular circumstances, it may be said that, in the relevant sense, the person's fear of persecution in relation to that country as a whole is well-founded: *Randhawa* per Black CJ at 442-3, Beaumont J at 450-1.

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 had regard to oral evidence given at a hearing and to documents contained on Tribunal case file 071129159 and Departmental case file CLF2006/141169. The Tribunal has also had regard to other material available to it from a range of sources as referred to in this decision.

In her application for a protection visa, the applicant identified herself as a national of Malaysia. She outlined her claims to protection in answers to questions 40, 41, 42, 43 and 44 of the relevant form in the following terms:

Question No 40: Why did you leave that country?

I left my Country Malaysia because of fear of my life. I come from a Tamil Hindu family. I was married with my husband in [year]. He did not treat me very well. He abused me. He tortured me. He beat me several times. I reported to the police but the police did not take any action. He always scared me by sending some goondas (wrong person) to assault me. Only after few years of married life, I was separated with my husband. I started to work in [Company] in [year] as a [occupation]. My husband was also working in that company as [occupation]. He has a friend who is a fundamentalist Muslim. When he knew that I am separated from my husband, he started to follow me. He is also working in the same company. After finishing my work, I wanted to go home. That Muslim man with his fellow friends followed me and told me to leave my Hindu religion and become Muslim. Many times, he told me that if I become Muslim he can find a rich Muslim businessman and there is no need to work hard in factory. I come from a very rigid Hindu Tamil family. Malaysia is very rigid Muslim Country. This is very common practice in Malaysia to convert a Hindu into Muslim religion. Every year, these Muslim converts many Hindu in Muslim. They get reward for that The police is Muslim. The Government is run by the Muslims. No body ready to believe or hear any complain about conversion.

In [year], I divorced my husband. When that Muslim man (T) knew that I have officially divorced my husband he tried many times to approach me and assault me and by force wanted to convert me in Muslim religion. In last [month] one day in the evening I was coming back from work. He suddenly grabbed me near the pathway to home. He tried to sexually assault me but I escaped with a help of Tamil Hindu man who is also returning from work. That Muslim man (T) threatened me and told me that next times he will kidnap me. He told me that if I report about this incident to the police he would kill me. After that incident I became very fearful. I did not go to work since that time. My brother organized travel ticket to Australia. I left my country for the fear of harm. I have a real fear of persecution from that Muslim. I do not want to be Muslim. In Malaysia it is very common. No body hears any complain. There is no protection from the authorities.

41: What do you fear may happen to you if you go back to that country?

I fear from Muslim man who can kidnap me and assault me and convert me in a Muslim religion, which I don't want. I do not want to be assaulted and changed by force in Muslim religion. The Muslim think a woman as slave and property. Thousands of women have been victims of this conversion.

42: Who do think may harm /mistreat you if you go back?

They would harm /mistreat me if I go back to my country The Muslim man (T) Who is after me? He is extremist Muslim.

43. Why do you think this will happen to you if you go back?

It would happen to me because they know me personally. They know that I am a Hindu woman.

I have told about that to the many factory workers. I have made complain to the police. They know that the Police are Muslim they cannot do any thing. I am poor, weak and helpless.

44. Do you think the authorities of that country can and will protect you if you go back to? If not why?

The Malaysia is a Muslim country. Malaysia is leader of the Asian Muslim Country. The fund is given to the Muslim organizations to convert the poor people of the region to convert tern in Muslim. All Muslim Mullahs are awarded for conversion. I do not have any protection from the authorities. I fear, if I go back to Malaysia. They can convert me. They can assault me. They can do whatever they like. The local police never give any effective protection to the Hindus.

The delegate was not satisfied that the applicant was owed protection obligations by Australia and the applicant sought review of that decision.

The applicant gave evidence that she had been born in Malaysia and was a citizen only of that country. She explained that she had never travelled outside Malaysia except for this journey to Australia.

The applicant explained that she was scared that there would be trouble with Muslims in Malaysia if she returned there. Some Malaysian Muslims had given her trouble in the past and had asked her for sex and told her that they would kill her if she reported them to the police.

The applicant explained that she had married in a specific year and both she and her husband started work at a named company in a specific year in the early 1990s. Her husband did not look after her well and used to beat her and lock her up. After she was no longer able to bear these things she went to live with her mother.

From the following year the applicant's husband used to come and go and after this she went to live with her mother. From this time, about five Muslim men who worked at the same factory and were friends with her husband gave her trouble. She divorced her husband in a specific year and from that time they gave her more trouble.

On one occasion, the men stopped the applicant while she was travelling home in her car. This had been away from the factory because at the factory there were many guards. They had asked her to come for sex and she had told them she could not do that. They told her they would kill her if she reported them to the police. She was able to get into her car and get away from them. This was the only occasion when she was stopped in her car. Otherwise, the men gave her trouble at her work and would tell her that she should become Muslim. The men never came to her home. She believed this was because her brother and son were there.

The applicant did not report the matter to police because she was scared. And because it always cost money to report a matter to the police in Malaysia and her family were not rich.

The applicant worked at the Company for many years but she ceased working because she was scared after being stopped in her car. She then went to live in another area with her elder sister.

The applicant gave evidence regarding her siblings who lived in Malaysia. They were all married and a number of them worked. They lived in different parts of Malaysia and none worked at the factory at which she had worked.

The applicant was asked about the prospect of living in her sister's area. She explained that she had a home there and that she thought she could obtain employment there because two of her siblings worked there. She explained that she thought the men would not trouble her in that area because it was some distance from her former home. She explained that if she returned there she would not have any money. She explained that she planned to do this after the matter had cooled down.

The applicant was asked how she would determine when it had cooled down and she explained that her brother would tell her of this. None of the men had been in contact with her or any member of her family since they stopped the car several years ago. She explained that she thought it may have cooled down sufficiently by the end of 2007, but she could not be sure.

In respect of the current circumstances for those of minority faiths in Malaysia the current United States Department of State Country Reports on Human Rights 2006, notes:

The constitution provides for freedom of religion; however, the government placed some restrictions on this right. Islam is the official religion, but the

government significantly restricted the practice of Islamic beliefs other than Sunni Islam. Non Muslims, which included large Buddhist, Christian, Hindu, and Sikh communities, were free to practice their religious beliefs with few restrictions. The government provided financial support to an Islamic religious establishment and also provided more limited funds to non Islamic religious communities. State authorities imposed Islamic religious laws administered through Islamic courts on all ethnic Malays (and other Muslims) in some civil matters but generally did not interfere with the religious practices of the non Muslim community.

The Registrar of Societies, under the Ministry of Home Affairs, registers religious organizations. Registration enables organizations to receive government grants and other benefits. Various religious groups were not recognized as such by the government, and they sometimes registered themselves as businesses under the Companies Act to operate legally.

Prime Minister Abdullah, a proponent of Islam Hadari ("civilizational Islam"), continued to emphasize religious tolerance towards all faiths. In January non Muslim cabinet members presented a memorandum to the prime minister calling for a review of constitutional provisions affecting the legal rights of non Muslims. Following protests from several Muslim leaders within the governing coalition and a commitment by the prime minister to address the non Muslim ministers' concerns, the ministers withdrew their memorandum. The prime minister stated publicly that the constitution provided sufficient protection of religious freedom and therefore should not be reviewed or amended.

The report notes that deviations in Islam were not tolerated and resulted in investigations and arrests and that the Sharia law had a significant place in governing the country's moral behaviour and affected the rights of women. In respect of the relationship of religions it was noted that:

On June 13, the National Fatwa Committee (the primary advisory body to the National Fatwa Council that guides Muslims on religious matters) announced its resolution that Muslims should not attend traditional "open house" festivals in honor of other religions' holidays. According to news reports, the committee said such gatherings could erode Muslims' faith and lead to blasphemy. The minister of culture, arts, and heritage called the recommendation regrettable, stating that it undermined efforts to improve racial and religious harmony.

## **FINDINGS AND REASONS**

In this matter, the Tribunal finds that the applicant is a national of Malaysia and no other country. She has consistently maintained that this is the case and has presented and travelled to Australia using a passport issued by the authorities of that country.

The applicant has claimed a fear of harm arising from her Tamil ethnicity and following of a minority religion, Hindu, in Malaysia. She points to past mistreatment as evidence of what may occur on her return, noting that she believes there will be further attempts for her to

convert and further significant harassment and possible assaults by a group of Muslim men should she return.

In the Tribunal's view, there is extremely little likelihood that the applicant would come to any harm on return to Malaysia where she to relocate her residence to her sister's location. The previous harassment and difficulties experienced by the applicant have all arisen in the contact of her employment in Kaula Lumpur. Those who have been persistent in harassing her in the past on account of her religion and her status as a divorced woman have only done so in the context of that employment.

The evidence of the applicant at the hearing was that the men have never approached her home or any relatives and with one exception the harassment only occurred in the workplace. The one exception occurred at a time when they knew she would be travelling from her workplace other home.

In the Tribunal's view, there is no doubt that these men were only interested in the applicant while she maintained employment at their place of work. Their harassment of her did not extend beyond that and since she ceased employment there has been no attempt to locate her at her home or through contact with members of her family.

The applicant herself in her oral evidence to the Tribunal indicated strongly that she believed she would ultimately be safe from the threatened harm in her sister's location. She claimed that it was her intention to move there in the future and that she did not believe the men who threatened her with harm would locate her there. On the evidence, the Tribunal agrees with these conclusions and is of the view that the applicant could safely and reasonably relocate to that area on her return. The applicant owns a home in the area and her evidence at the hearing was that she believes that she could find employment in the area, noting that she already has relatives working there. There did not appear to be any reason why she could not relocate from Kaula Lumpur to this location and find safety there.

The only issues the applicant raised to her relocation was that she thought she needed to wait for a longer period before doing so. She noted that this was her plan, when her brother advised her that matters had cooled down. It is the Tribunal's view, however, that this reasonable option for securing her safety is available to the applicant currently. There has been no attempt by the men concerned to contact the applicant or locate her through members of her family since she ceased attending her workplace. There was no attempt to locate her during the period that she lived in her sister's location before coming to Australia. She has not asked her brother whether it is currently safe, however, in the Tribunal's view there is no reason why she could not avail herself of the option of relocation at the present time. The threat to the applicant does not, in the Tribunal's view, extend beyond her employment at the plant at which she formerly worked.

In the Tribunal's view, the applicant is able to secure effective protection from harm within the borders of Malaysia by relocating from her former place of residence to the area of her sister. It is both reasonable and feasible for her to do so. In the Tribunal's view, given that the negative interest of some men at her former work was limited to that employment, she would attain protection through relocation. In the Tribunal's view, by pursuing this action there would be no possibility of the applicant being harmed by the men she fears in Malaysia.

While there is some evidence of religious tensions within Malaysia between the majority Muslim and minority religions, there is also evidence that the Government takes steps to



attempt to control and alleviate such tensions. The applicant's fear of harm extends to a group of men associated with her former workplace and she has not expressed any more generalised a fear.

Given these conclusions, it is the view of the Tribunal that the applicant is not a person who is a refugee within the meaning of Article 12A of the Refugees Convention as amended by the Refugees Protocol. She therefore is not owed protection obligations by Australia and does not meet the criteria prescribed for a Class XA visa. She must, therefore, be refused the grant of such a visa under s. 65 of the Act.

## **DECISION**

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

<p>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 <i>Migration Act 1958</i>.                      PRRRNM</p>
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