

0806751 [2009] RRTA 11 (6 January 2009)

DECISION RECORD

RRT CASE NUMBER: 0806751

DIAC REFERENCE(S): CLF2008/107503

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Andrew Jacovides

DATE: 6 January 2009

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

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 India, arrived in Australia and 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.
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. 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 Part 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.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department file CLF2008/107503, with the protection visa application and the delegate's decision, and the Refugee Review Tribunal (RRT) file 0806751, with the review application.
20. The applicant appeared before the Tribunal to give evidence and present arguments.

Department file CLF2008/107503

21. The applicant claimed in his protection visa application that he was born in Country 1 to Indian nationals. He stated that he was a citizen of India. He submitted a partial copy of his passport issued by the government of India. He indicated that he was fluent in Hindi and Marathi.
22. The applicant stated that he and his parents moved to City A, India in early 1990s and he came to Australia mid 2000s to study. He claimed that when his visa expired he was afraid to return to India because he was a devout Roman Catholic. He claimed that Catholics in India were persecuted by Hindus and other non-Christians. He claimed that the authorities either did not assist Christians or they were unable to remedy the situation. He claimed that he was prevented from participating in religious activities of his choice and he was physically attacked for being a Christian. He claimed he did not remember when he and members of his family were attacked but it was between mid 1990s and mid 2000s. He claimed that if he returns to India he will be harmed by the non-Christian majority, including Hindu fundamentalist nationalists, and he will not have access to state protection.
23. The applicant was interviewed by the delegate and a recording of the interview is on file and the Tribunal has listened to interview. The applicant confirmed that he came to Australia to study in mid 2000s and that his visa has expired. He was asked why he did not apply for a protection visa earlier. He stated that it was not until this year that he realized that protection visas existed and that he could apply for one.
24. The applicant claimed that after he and his family returned to India from Country 1 they attended one particular Catholic Church which came under attack from Hindus. He stated that in early 2000s his family was forced to leave the first church and attend another. The applicant stated members of his family continue to attend the same church in City A. He stated that the missionaries at his church in City A worked with low caste

members of society. He stated that such activity attracted the adverse interest of other religious/social groups in the community. He stated that some Hindus objected to Dalits being converted to Christianity. He stated that as a member of the church he participated in community outreach activities. He stated that he had an educational role in the community, and his aim was to spread information regarding Christianity, but it was not his task to convert Hindus to Christianity. He stated that Hindu extremists forced him to stop his community work with underprivileged Hindus. He stated that his parents continue to be active with the church and to participate in community activities. He stated that one family member tends to work for the church on most days. The applicant stated that he has continued to participate in religious activities in Australia. He stated that he tried to attend church services every Sunday.

25. The delegate accepted that the applicant was a Catholic and that he had been targeted by Hindu extremists in India. He found however, that the persecution was “private persecution” because it was not undertaken by or with the approval of the authorities. The delegate found that the applicant will have access to protection by the state if he requires protection in the future.

RRT file 0806751

26. The applicant did not provide any claims in support of the review application.

The hearing

27. The hearing was conducted in English at the applicant’s request. He is fluent in English. The applicant essentially repeated his claims during the hearing. He stated that he was a devout Roman Catholic. He claimed that he was interested in participating in community outreach with the church but he anticipated that in India he would attract the adverse interest of Hindu extremists. He stated that in India he was involved with a church youth group, which educated the poor regarding the benefits of Christianity, and he wanted to be involved in similar activities in the future. He stated that in Australia he has attended religious services in two different Catholic churches since he arrived here. He stated that he maintained a low profile, and he was not involved in church activities or outreach work, because he was living here illegally and he did not have the physical or psychological security to participate in such activities. The applicant claimed that he wanted to return to India but family members urged him to remain here because India was a dangerous place for a Christian.
28. The Tribunal referred to the US Department of State, *International Religious Freedom Report 2008* (Released September 2008), at <http://www.state.gov/g/drl/rls/irf/2008/108500.htm>, and commented that the report indicates that there has been violence against Christians in certain parts of India where Hindu extremists are active. The Tribunal commented that other areas of India, including parts of Kerala, Tamil Nadu, Goa, Nagaland, Mizoram and Meghalaya, had sizeable Christian communities and Christians in those communities were able to practice their religion without harassment or violence by Hindu fundamentalists or any other religious group. The applicant stated that it was not practical for him to move from City A to one of the places where Christians were in the majority. He stated that City A was a large urban centre where he would have access to social networking and employment opportunities. He stated in other parts of India he would have difficulties with the language or he may not be able to attain the lifestyle he is seeking. The Tribunal commented that he appeared to have

the ability and resources to relocate successfully in India to a place where he could practice his religion without fear of harassment or violence from Hindu extremists or any other religious group.

29. The Tribunal discussed with the applicant the circumstances of family members in City A. He stated that they were all devout Catholics. He stated that one family member attended church most days and she undertook community work for the church. He stated that she and another family member have not been directly targeted by religious extremists but they were harassed when they participated in protest activities against the government. He stated that the above family members and other members of their church were lobbying the government for greater protection and religious freedom for Christians in India. He stated that the protests attracted the adverse interest of extremists. The applicant could not recall when these events took place.
30. The Tribunal asked the applicant if a third family member suffered any difficulties regarding her religion. He stated that she was a religious person but she did not participate in religious activities. He stated that she was afraid of extremists. The applicant indicated that she had not been directly targeted for being a Christian.
31. The applicant claimed that if he returns to India he will not be able to participate in religious activities of his choice, including community outreach work with low caste Hindus. He stated that if he was involved in community work he will be at risk of attack by Hindu extremists. He stated that the authorities in India will not be able to protect him from the harm he anticipates.
32. The Tribunal asked the applicant if he could name his priest or priests in Australia He stated that he did not know their names. The Tribunal indicated to the applicant that it required evidence from him that he participated in religious activities since he arrived in Australia. He was asked to provide statements from persons who witnessed his involvement in church services. The applicant stated that he would provide the statements required. The Tribunal asked the applicant to submit the evidence by a set date.
33. The Tribunal did not receive a submission from the applicant after the hearing.

FINDINGS AND REASONS

34. The applicant claims to be a citizen of India The Tribunal has considered the evidence provided by the applicant in support of this claim, including his Indian passport, and it accepts that he is a citizen of India.
35. The applicant claims to be a devout Catholic. He claims that he wants to be involved in community outreach work with the Catholic Church in India. He claims that he will be targeted by Hindu extremists and others from the non-Christian majority in India who will object to his religious activities. The applicant claims that he was previously targeted by persons who objected to his religious activities and he is fearful that he will be targeted again for the same reasons. He claims that he was prevented from participating community outreach work with disadvantaged Hindus in City A. The applicant claims that if he participates in similar religious activities in the future he will

be targeted again by the non-Christian majority, including Hindu fundamentalist nationalists. He claims that the authorities will not protect him from the persons he fears. He claims that relocating within India, to a predominantly Christian community, is not reasonable for him because he will suffer language, employment, and networking difficulties.

36. The Tribunal accepts the applicant's claim that he is a Catholic and that he was targeted by non-Christians in City A in the way he described. The Tribunal accepts his claim that he was involved in community outreach work with his church in City A and that he was prevented from undertaking such work by persons who objected to it. The Tribunal accepts the applicant's claim that he is interested in undertaking similar work in the future and that he is fearful that he will be prevented from doing so. Nevertheless, the Tribunal has formed the view that the applicant can safely and freely participate in religious activities of his choice in India by relocating to a predominantly Christian community.
37. The applicant claims that relocation is not reasonable for him because he will have language, employment, and networking difficulties. He states that a large urban environment such as City A would better suit the lifestyle he is seeking. However, the Tribunal finds that these concerns relate to the applicant's lifestyle aspirations rather than his fear of persecution for a Convention reason. The Tribunal has considered the applicant's individual circumstances and whether it is reasonable for him to relocate within India. The Tribunal finds that the applicant is a multilingual, well-educated, and resourceful person. The Tribunal finds that he has the ability and knowledge to relocate successfully within India. The Tribunal is satisfied that it is reasonable for the applicant to relocate within India to one of several regions in India which have large Christian communities.
38. The Tribunal is satisfied, after considering information from the US Department of State, *International Religious Freedom Report 2008* (Released September 2008), that despite incidents of violence against Christians in certain parts of India, there are areas within India, including parts of Kerala, Tamil Nadu, Goa, Nagaland, Mizoram and Meghalaya, which have sizeable Christian communities. The Tribunal is satisfied that in those regions Christians are able to practice their religion without harassment or violence by the non-Christian majority. The Tribunal finds that by relocating to a predominantly Christian community in India the applicant can safely practice his religion and participate in religious activities of his choice.
39. The Tribunal considered the applicant's claim that the authorities will be unable or unwilling to provide him with protection in India. The US Department of State, *International Religious Freedom Report 2008* (Released September 2008), indicates that there is violence between religious groups in India and that the authorities have not always been able to contain the violence or to ensure that all citizens can freely and safely practice their religion throughout India. However, the Tribunal is satisfied by the information that not all Christians in India are targeted by non-Christians and that there are areas within India which are predominantly Christian and where Catholics and other Christians can freely and safely practice their religion. The Tribunal finds that in those regions, Christians are not targeted by Hindu extremists, or other religious groups, or persons from the non-Christian majority. The Tribunal finds that Christians in those regions have access to a reasonable level of protection by the state which permits them to pursue their religious interests. The Tribunal is satisfied that in those

regions the applicant will have access to a reasonable level of protection by the state so he can participate in religious activities of his choice.

40. Accordingly, and in view of the above findings, the Tribunal is not satisfied that the applicant faces a real chance of serious harm by religious extremists, the authorities, or anyone else in India, for reasons of religion or any other Convention reason.

CONCLUSIONS

41. 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.

DECISION

42. 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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