

060793720 [2006] RRTA 197 (21 NOVEMBER 2006)

DECISION RECORD

RRT CASE NUMBER: 060793720

DIMA REFERENCE(S): CLF2006/057583

COUNTRY OF REFERENCE: Israel and the Occupied Territories (West Bank)

TRIBUNAL MEMBER: Andrew Jacovides

DATE DECISION SIGNED: 21 November 2006

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

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

The applicant, who claims to be stateless and formerly resident in Israel and the Occupied Territories (West Bank), arrived in Australia and applied to the Department of Immigration and Multicultural Affairs 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.

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) 222 CLR 1 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.

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 before it the Department's file relating to the protection visa application and the Refugee Review Tribunal (RRT) file relating to the review application. The applicant appeared before the Tribunal to give evidence and present arguments. The applicant was represented in relation to the review by a registered migration agent.

Department file CLF2006/57583

The applicant stated in his protection visa application that he was born in the Occupied Territories. He described himself as a Palestinian Muslim. He stated he completed ten years of education and he was subsequently self-employed. He stated he lived in the Occupied Territories and Israel. The applicant visited Australia.

The applicant claimed that he was accused of "being an Israeli spy or a collaborator to Israel" after one of his close friends was "executed" for being a collaborator (f. 77). He claimed he received a summons from the Palestinian authorities shortly after his friend was killed. The applicant claimed he could not receive a fair trial in Palestine so he fled to Israel and he remained there, in hiding, until he came to Australia. He claimed he would be killed as a collaborator in the occupied territories.

The applicant submitted a statement of his claims; a copy of his birth certificate indicating that he was born in the Occupied Territories and he was Palestinian; a partial copy of a travel document issued to him by the Palestinian Authority indicating that he crossed into Israel several times after he departed Australia and before he returned; a copy of his Australian Temporary Business visa which was granted in Israel and was valid for multiple entry; a copy of a summons with a translation, identifying the applicant by name, identification card number, and address, instructing him to present himself to a police station within a week or face legal action; an article in Arabic with a partial translation reporting on the killing of a number of Palestinians because they were suspected of collaborating with the Israeli authorities; a copy of his father's identification card with a translation; copies of medical certificates which the adviser stated indicated that the applicant's father was ill when the applicant returned to Israel; a travel permit application issued by a hospital to the applicant's father indicating that he was to receive treatment at the hospital; a travel permit issued to the applicant's father to enter Israel for medical treatment; a statement from a person claiming he assisted the applicant to "escape his unfortunate situation" (f. 2) in Palestine when he was accused of spying for Israel (see ff 3-25).

The Department received another submission from the applicant's adviser with newspaper reports dealing with the killing of informers/collaborators in the occupied territories (ff 105-121). The Department received another submission from the applicant's adviser. He essentially repeated the applicant's claims (ff 125-126, and a copy at 142-143).

The Department received a letter which was faxed to Australia. The author claimed to be the wife of a murdered Palestinian and the applicant's relative (ff 140-141). The author claimed that her husband was "coerced into being an informant by Israel for financial reasons" (f. 141) and that similar suspicions had been cast against the applicant because he and her

husband were close friends. The author stated that after her husband was killed, the applicant was forced to flee and go into hiding to avoid harm from militants who assumed he was an informant for Israel. A copy of *Contract of Marriage* was submitted to indicate that the author was married to the person referred to in the article (f. 139).

The applicant was interviewed by an officer of the Department. The applicant essentially repeated his claims. He indicated that his parents and siblings lived in the occupied territories. He claimed he lived in Israel illegally for a number of years.

The applicant claimed that he fled the occupied territories after his friend was killed for being a collaborator. He claimed that he lived in Israel until he came to Australia on the first occasion. The applicant stated that he returned to Israel to see his father who was ill. He claimed that he went to Jordan and he travelled to Israel to see his father. The applicant claimed that he will be killed by Palestinians who believe he is a collaborator.

The delegate was essentially not satisfied that the applicant provided a credible account of his circumstances in Israel and the occupied territories.

The hearing

The applicant stated that the adviser who assisted him to lodge the protection visa application was no longer acting on his behalf. He stated he and the adviser had a dispute over fees. He explained that the adviser initially agreed to represent him for a set fee, which the applicant paid, but he then demanded more money. The applicant stated he had doubts as to whether the agent was competent.

The Tribunal referred the applicant to his protection visa application and the statement he submitted to the Department. He was asked to describe how these documents were compiled. The applicant stated that he and the adviser communicated as best they could without the assistance of an interpreter. He stated he did not speak English and the adviser did not speak Arabic. The applicant indicated that one of his friends assisted him to communicate with the adviser. He claimed that he later realised that the adviser had misunderstood one of his core claims. He stated that his best friend and relative had a different name than as indicated in the statement.

The Tribunal discussed with the applicant the sequence of events which led to his decision to flee the Occupied Territories. He essentially repeated the same claims he provided to the Department except he stated that his close friend who was accused of being a collaborator was the other name. He indicated that this man's wife was a relative of his. The applicant stated that this man was his best friend and they spent considerable time together. He claimed that after he was murdered, he also accused of collaborating with the Israeli authorities. He claimed he received a summons to attend a police station. He stated it was common practice where he lived for complaints to be lodged at a police station and for the police to subsequently summon the accused to discuss the matter. He stated shortly after the first notice arrived and he fled to Israel. The applicant claimed that more notices were received later, including the one he submitted with his protection visa application. He stated he did not respond to any of the notices. He claimed that if he had gone to the police he would have been killed by Hamas or other extremists who considered him a traitor. He stated he effectively remained in hiding until he came to Australia. The applicant claimed that when he came to Australia for the first time he intended to remain here and seek protection. He stated

he had to return to Jordan because his father was seriously ill. He stated his father was receiving medical treatment in Israel although he was not allowed to live there.

The Tribunal discussed with the applicant his living conditions. He stated he lived and worked where he worked. He stated he worked in a factory and he slept there most of the time. The applicant stated that the area was a disputed territory with both sides claiming it belonged to them. He stated the area was effectively cleared of residents and it was mostly used for industrial purposes. The Tribunal consulted *Microsoft Encarta Interactive World Atlas 2000* which indicated that this area was in “disputed territory” although classified as the West Bank. The applicant stated that he sometimes went to another house. He stated he carried one of his relative's identification documents but he had no difficulties with the authorities throughout his stay. The applicant claimed that he sometimes returned to the Occupied Territories, discreetly and only for a few hours, to see his family.

The Tribunal commented that the persons he fears in the Occupied Territories had ample opportunity to find and kill him if indeed he was suspected of being a collaborator. He stated he was hiding and only his parents knew exactly where he was. The Tribunal asked him why he did not remain in Israel. He stated that he was there illegally so there was always a risk that he would be forced back to the Occupied Territories.

The applicant claimed that Hamas and other extremists in the occupied territories were still seeking to harm him for his alleged collaboration with Israel. The Tribunal asked the applicant if he was an informant for Israel. He stated he was not. The Tribunal asked him if he realised that his best friend was an informant. He stated he only learned of his activities after he was killed, but he did realise that his friend had contact with Israelis in the armed forces.

The Tribunal commented that security measures were heightened in Israel at the time he was living there. He was asked how it was possible for him to live there, move around, return to the West Bank, and re-enter Israel, without being detected. The applicant stated that the border was porous and it was easy to cross from Israel to the West Bank and vice versa. He stated he was not seeking to live or work there legally so he did not have to pass through check points. He stated that his father for example, who was seeking medical treatment in Israel, had to obtain the necessary documents and pass through the checkpoints so he could legally enter Israel and have access to the medical treatment he required.

The Tribunal asked the applicant why he decided to come to Australia. He claimed that it was apparent to him and his family that he could not be safe in the occupied territories because Hamas, which he referred to as an extremist group, continued to demonstrate an interest in him. The applicant claimed that it was very difficult for a Palestinian to clear his name once he was accused of being a collaborator. He stated members of his family were harassed because the community suspected him of being a collaborator. The applicant stated that Palestinians were brutal towards collaborators and often killed individuals before it was clearly established that they were collaborators. He stated persons were killed because of mere suspicion or gossip that they were collaborators. The applicant claimed that he will be harmed or killed by political extremists in the occupied territories without an opportunity to defend himself. He claimed the authorities will either be unable or unwilling to assist him. He claimed Hamas, the group he feared, yielded considerable power in the occupied territories and the authorities were often under the group's influence.

Information from external sources

The Tribunal considered the following reports dealing with human rights conditions in Israel and the occupied territories:

- US Dept of State Country Report on Israel & the Occupied Territories for 2005 (Published in March 2006) at <http://www.state.gov/g/drl/rls/hrrpt/2005/61690.htm>
- The Israel & the Occupied Territories section of Amnesty International Annual Report 2006 (Published May 2006) at <http://web.amnesty.org/web/web.nsf/print/4249E7F6086F4D4B80257164005B1BDB>
- The Palestinian Authority section of Amnesty International Annual Report 2006 (Published May 2006) at <http://web.amnesty.org/web/web.nsf/print/C319C1FC74DF70D780257165004A2E13>
- BBC Country Profile relating to Israel & Palestinian Areas (Published 15 August 2006), at http://news.bbc.co.uk/2/hi/middle_east/country_profiles/803257.stm

FINDINGS AND REASONS

The applicant claims he is a Palestinian born in the West Bank. He claims the only place where he can legally reside is the occupied territories administered by the Palestinian Authority. He claims that a friend and relative were murdered after he was found to be an Israeli informant. The applicant claims that he was also suspected of collaborating with the Israeli authorities due to his close association with this man. The applicant claims that soon after his friend was killed he fled from the Occupied Territories and went into hiding in Israel. He claims he remained in hiding until he was able to arrange his journey to Australia. The Tribunal accepts these claims.

The applicant claims that Hamas, and the community in his home town, suspect him of being a collaborator. He claims that extremists in the occupied territories have killed Palestinians on mere suspicion or gossip that they are collaborators. The applicant claims that he will be harmed or killed by Hamas and other political extremists in the occupied territories without an opportunity to defend himself. He claims he will not have access to protection by the state.

The Tribunal has considered information from external sources provided by the applicant, and the reports listed above, and finds that there are widespread human rights abuses in the occupied territories. The Tribunal accepts the applicant's claim that persons suspected of being collaborators or informers for Israel are at risk of serious harm by Hamas and other similar groups which yield considerable power in the occupied territories. The Tribunal accepts the applicant's claim the authorities are either unable or unwilling to provide meaningful protection to Palestinians suspected of being collaborators or informers.

The Tribunal accepts the applicant's claim that if he is forced to return to the occupied territories he will be at risk of serious harm by Hamas, and other individuals or groups, because he is suspected of collaborating with the Israeli authorities. The Tribunal finds that the applicant will not have access to meaningful protection by the state and he will not be given an opportunity to defend himself.

The Tribunal accepts the applicant's claim that he lived discreetly in Israel, hiding from the persons he feared in the West Bank. The Tribunal accepts his claim that it was neither a secure or permanent living arrangement for him.

The Tribunal considered the applicant's residency status in Israel and whether he can legally return and live there. The Tribunal is satisfied that the applicant does not have the right to return or live in Israel.

The Tribunal finds that the applicant has a well-founded fear of persecution in Israel and the occupied territories, by persons and groups who suspect him of collaborating with Israel, for reasons of imputed political opinion.

CONCLUSIONS

The Tribunal is 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 satisfies the criterion set out in s.36(2) for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

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 ID: PRMHSE