

0907276 [2009] RRTA 1087 (4 December 2009)

DECISION RECORD

RRT CASE NUMBER: 0907276

DIAC REFERENCE(S): CLF2009/83925

COUNTRY OF REFERENCE: Philippines

TRIBUNAL MEMBER: Kerry-Anne Hartman

DATE: 4 December 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 Philippines, arrived in Australia.
3. The applicant applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa.
4. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter dated the same day.
5. 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.
6. The applicant applied to the Tribunal for review of the delegate's decision.
7. 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

8. 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.
9. 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).
10. 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'

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

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

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

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

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

CLAIMS AND EVIDENCE

21. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

22. According to his protection visa application the applicant was born in the Philippines. He is Roman Catholic. The applicant states he has completed 19 years of education. He states that he attended Universities and completed his degree. The applicant provided no details of his employment. The applicant states he resided at the same address from the mid 1990s.

23. In his protection visa the applicant made the following claims:

- I studied [field] at university In [date] my friend told me his friend wanted to sell a business. I really wanted to buy it but I didn't have enough money. I borrowed money from a loan shark.
- The business was not a good business and I lost all the money.
- I could not pay the money I borrowed from the loan shark.
- The loan shark hired some gangsters to threaten me.
- I arranged travel documents and fled to Australia.
- I fear the loan shark may ask the gangsters to harm me if I go back.
- I do not think he authorities can protect me because they do not have "full power".

24. The applicant submitted with his application a copy of his passport. The information from the applicant's passport indicates he was granted a visitor visa in the mid 2000s and he arrived in Australia few months later.

Delegate's decision

25. The delegate found that the claims the applicant made related to a criminal matter and were not Convention related. The delegate did not accept that the applicant would be mistreated or denied protection by the Philippine authorities for any Convention reason.

Application for Tourist visa

26. In his application for a tourist visa the applicant stated that the purpose of his visit was to see a former office mate and friend. He stated that had been employed for a number of years as a Junior Executive Assistant He stated that he would be able to support himself financially during his visit. The applicant submitted a letter from his employer stating he had been

employed since late 1990s The applicant submitted a letter from a bank showing his savings account and its current balance.

Application for review

27. The applicant lodged an application for review. No further information, documents or submissions were lodged in support of the application.
28. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Tagalog and English languages.

Summary of evidence provided at the hearing

29. The Tribunal asked the applicant about his employment. He claimed that after finishing his course it was difficult to get work in the Philippines. He claimed in the late 1990s he got a job in the government. He claimed from the late 1990s to the mid 2000s he was employed as a “junior administration assistant” at [name of the institution]” a government institution. The applicant claimed the office was in Manilla. The applicant claimed that from the early 2000s to the mid 2000s he did a post graduate course at a University. The applicant claimed he worked and studied part time.
30. The Tribunal asked the applicant about his place of residence. The applicant claimed that he lived with his mother during the week and on the weekends he lived with his wife. He claimed that his wife lived with her mother about one hour’s drive from his mother’s home.
31. The Tribunal asked the applicant about his family. He claimed that he was married and had two teenage children and were at school.. The applicant claimed his wife didn’t work. The applicant claimed his mother was a professional The applicant claimed his mother had paid for him to do his post graduate degree.
32. The applicant submitted his passport to the Tribunal. He confirmed that he had been granted a visitor visa and arrived in Australia on a specific date.
33. The Tribunal asked the applicant why he left the Philippines. The applicant claimed it was best if he read the Tribunal the reasons why he left the Philippines. The Tribunal asked the applicant if he could tell the Tribunal in his own words rather than reading from a piece of paper why he left the Philippines.
34. The applicant claimed he feared for his life. He claimed that “[Year]” a friend told him he was selling his business. The applicant claimed it was an importing business. The applicant claimed that he wanted the business because he didn’t earn enough money in his government employment job. The applicant claimed that he got a loan from a “loan shark” to buy the business. The Tribunal asked the applicant when he got a loan from the loan shark. He claimed “[Year]” The Tribunal asked the applicant when in the mid 2000s. He claimed [Month, Year]”.
35. The applicant claimed that the business opened in the mid 2000s. The applicant claimed that his wife looked after the business. The applicant claimed he also employed few people to help in the business. The applicant claimed that his business operated well for few months. He then claimed the business operated well for several months The applicant then claimed that the business ran successfully until other businesses opened up.

36. The applicant claimed the business went bankrupt. The Tribunal asked the applicant when his business went bankrupt. The applicant claimed maybe after one year. He then claimed he didn't know the exact time. He then claimed maybe after several months. The Tribunal put to the applicant that a business going bankrupt was a serious thing and it thought he would remember when his business went bankrupt. The applicant claimed it was only a small business. He claimed it was a "[Type of business]".
37. The applicant claimed that the loan shark started asking for payments and he couldn't even pay them interest. The Tribunal asked the applicant when he couldn't repay the loan shark. The applicant claimed "[Number of Months]". The Tribunal asked the applicant if he could be more specific. The applicant claimed he couldn't repay the loan shark in the mid 2000s. He then claimed it was later in the year when he couldn't repay the money. He then claimed he thought it was around several months earlier that he couldn't repay the loan shark.
38. The applicant claimed they started threatening him. He claimed they told him they would hire gangsters to harm him. The Tribunal asked the applicant how they threatened him. The applicant claimed that they called his mobile and they came to his house. The Tribunal asked the applicant if he could provide more details about the threats. The applicant claimed that they called his mobile 2-3 times a day. He claimed that when they rang he told them that if he got some money he would pay them. He claimed that he was threatened for about one month. He claimed that he had no choice but to leave the Philippines. The applicant claimed he applied for a visitor visa to leave the Philippines.
39. The Tribunal asked the applicant if he ever went to the police. The applicant claimed he went to the police but they told him because he had nothing in writing there was nothing they could do as it was a personal matter.
40. The Tribunal put to the applicant it had difficulty with the claims he had made as they did not appear to be Convention related. The Tribunal put to the applicant that because he had borrowed money from a loan shark and couldn't repay the money he had been threatened. The applicant referred to the paper in front of him. He claimed that it was a group who harmed him a group of loan sharks and because he couldn't pay the group they threatened him. He then claimed he belonged to a "group". He claimed it was a "group of people who owed loan sharks money". He claimed that he was threatened because he was a member of that group.
41. The Tribunal put to the applicant that he had arrived in Australia but had not applied for a protection visa for several years. The applicant claimed that when he first arrived in Australia he was looking for job opportunities. He claimed he was trying to find someone to sponsor him. He claimed he wasn't offered a job and couldn't find anyone to sponsor him. He claimed that his visa ran out and he didn't know he could apply for a protection visa until a friend told him he could. The Tribunal put to the applicant that his delay in applying for protection may lead the Tribunal to find he was not a witness of truth and his claims had been fabricated. The applicant claimed that he came to Australia to try his luck and start a new life.
42. The Tribunal put to the applicant that the country information before the Tribunal did not indicate that he would be unable to obtain police protection if he had been threatened by gangsters. The applicant claimed that he just wanted to stay in Australia a little longer to get some more money. He claimed that he had gone to another state to look for opportunities. He claimed that the situation in the Philippines was hard. He claimed that there have been three

typhoons and that there is high unemployment. He claimed he was well educated and wouldn't be a burden to the taxpayer.

43. The Tribunal put to the applicant that in his visitor visa application he had told the Australian Embassy that he was coming to Australia to visit an office mate. He had submitted a statement from his bank indicating he had a large amount in his savings account which would have been enough money to pay the loan shark. The Tribunal put to the applicant that the information he had submitted in his visitor visa application may lead the Tribunal to find that he was not a truthful witness and the claims he had made were not true which may lead the Tribunal to affirm the decision of the delegate. The applicant claimed "please give me a chance to stay a little longer". The applicant then claimed that the money in his savings account was his mother's. He claimed she had put the money into his account to convince the Australian authorities he had the funds to travel and support himself. The Tribunal put to the applicant that the fact that he had misled the Department in relation to his financial situation in order to obtain his visitor visa application may lead the Tribunal to find that he would be prepared to fabricate information in order to obtain a protection visa. This may lead the Tribunal to find he was not a witness of truth. The applicant claimed that he had no choice because he wanted to get a visa to travel to Australia.
44. The Tribunal put to the applicant it had difficulty accepting his claim that he left the Philippines because he feared he would be harmed as he had been issued with his visitor visa in but hadn't left the Philippines until a few months after the visa was issued. The applicant claimed he was trying to borrow money from friends and relatives to pay for his ticket. The Tribunal put to the applicant that he had told the Tribunal his mother was a professional who had paid for his post graduate degree and was supporting his wife and children in the Philippines.

Document submitted at the hearing

45. The applicant submitted to the Tribunal the paper he had tried to read from during the Tribunal hearing. According to the information in this submission is stated that the applicant had applied for a protection visa on the basis that he had a "well rounded fear" of being persecuted because he was a member of a particular social group". It stated that he had borrowed a significant amount of money from a group of people to start up a business. It stated he couldn't repay the loan and was threatened. It stated that they came to his house and demanded payment. It stated the threats continued over and over. It stated they made physical threats and threats by mobile phone. It stated that he filed complaints and the police turned a blind eye. It stated he had no choice but to run away.

FINDINGS AND REASONS

46. The applicant travelled to Australia on a Republic of The Philippines passport. The Tribunal is satisfied that the applicant is a national of the Philippines.
47. The applicant claims he borrowed money from a loan shark to buy a business. The applicant claimed that his business went bankrupt and he was unable to repay the loan. The applicant claimed that he was threatened by the loan shark. The applicant claimed that when he reported the threats to the police they told him it was a personal matter. The applicant claimed that he was forced to flee the Philippines as he feared he would be harmed.

48. The Tribunal did not find the applicant to be a truthful or credible witness and does not accept the claims he has made for the following reasons.
49. When the Tribunal asked the applicant why he had left the Philippines he picked up a piece of paper and asked the Tribunal if he could read the reason why he had left. The Tribunal is of the view that if the applicant had left the Philippines in fear of his life he would have been able to tell the Tribunal in his own words what had happened to him especially as he has completed 19 years of education has a post graduate degree and spoke perfect English.
50. The applicant's evidence at the hearing when asked about the claims he had made was vague and he changed his evidence numerous times. The applicant claimed he had borrowed money from a loan shark. When the Tribunal asked the applicant when he borrowed the money at first he claimed "[Year]". When the Tribunal asked him again when he claimed "[Year]". When the Tribunal asked him to be more specific he claimed "around [Month, Year]". The applicant claimed his business was successful "for a while". He at first claimed it operated for few months. He then claimed it operated for a year. He then claimed it operated for 15 months. The applicant claimed his business went bankrupt. When the Tribunal asked when his business went bankrupt he claimed "maybe after a year" He then claimed he didn't know exactly. He then claimed "maybe after 15 months". The applicant claimed that he couldn't repay the loan shark. The Tribunal asked the applicant when he couldn't pay the loan shark. He at first claimed in the mid 2000s. He then claimed November of a specific year. He then claimed he thought it was August. The applicant claimed that he was threatened. The Tribunal asked the applicant about the threats. The applicant claimed that they rang him on his mobile phone a 2-3 times a day and came to his home. He claimed that this went on for a month. He provided no further details about the threats. The Tribunal is of the view that the applicant's vague evidence when asked about the claims he had made and the fact that he changed his evidence indicated he was fabricating his responses rather than providing a truthful account to the Tribunal of what had happened to him.
51. The applicant applied for a visitor visa in the mid 2000s. In his visitor visa application he stated he wanted to come to Australia to visit a friend. He had also provided a bank statement that indicated he had a large amount in his bank account. When the Tribunal put to the applicant that the information he had submitted with his visitor visa application indicated he had the money to repay the loan shark he claimed it was not his money it was his mother's. He claimed that he wanted to come to Australia to try his luck and he put money in his account in order to convince the Australian authorities he had the capacity to fund his visit. The Tribunal is of the view that the fact that the applicant has provided misleading information to the Department to obtain his visitor visa indicates he would be prepared to fabricate claims in order to obtain a protection visa.
52. The applicant arrived in Australia a few months after his visa was granted. He did not lodge his claim for a protection visa until several years later. At the hearing the applicant claimed that when he first arrived in Australia he was looking for job opportunities. He claimed he wanted to find someone to sponsor him. He claimed that when his visa ran out he didn't know he could get a bridging visa until a friend told him he had applied. The Tribunal is of the view that if the applicant had been threatened and feared he would be harmed he would have sought protection soon after arriving in Australia. Further the applicant was issued with a visitor visa but he didn't leave the Philippines until several months later. When the Tribunal asked the applicant why he delayed leaving he claimed he had to borrow money for his ticket from his relatives and friends. The Tribunal does not accept that explanation. The Tribunal is of the view that if the applicant feared he would be harmed he would have left the

Philippines as soon as he obtained his visa. The Tribunal is of the view that the applicant's delay in leaving the Philippines and delay in applying for protection indicates he is not a truthful witness and his claims have been fabricated.

53. At the hearing the applicant read from a typed submission which he later submitted to the Tribunal. He claimed that he had applied for a protection visa on the basis he had a "well rounded fear" of being persecuted because he was a "member of a particular social group". At the hearing he claimed that he belonged to a group people. He claimed it was a "group of people who owed loan sharks money". He claimed that he was threatened because he was a member of that group.
54. A particular social group is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. The characteristic or element which unites the group cannot normally be a common fear of persecution. The Tribunal is unable to be satisfied that people who borrow money from loan sharks are cognisable group within the Philippines.
55. Taking into account all of the evidence the Tribunal finds that the applicant is not a witness of truth. The Tribunal does not accept that the applicant borrowed money from loan shark and was threatened when he couldn't repay the loan. The Tribunal does not accept that the applicant fled the Philippines because he feared he would be harmed. The Tribunal is of the view that the applicant has fabricated these claims in order to strengthen his claim to a protection visa.
56. The Tribunal finds that there is no real chance that the applicant will face persecution if he returns to the Philippines now or in the reasonably foreseeable future for any Convention reason. The Tribunal is not satisfied that the applicant has a well founded fear of persecution for any Convention reason.
57. The applicant has been living in Australia for several years. He claimed that life is hard in the Philippines. He claims that there have been three typhoons. He claims that there is high unemployment. The applicant did not request that the Tribunal refer the case to the Department for consideration by the Minister pursuant to s.417 of Act which gives the Minister a discretion to substitute for a decision of the Tribunal another decision that is more favourable to the applicant, if the Minister thinks that it is in the public interest to do so. The Tribunal notes that the applicant can still make a request directly to the Minister.

CONCLUSIONS

58. 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

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