

0803250 [2008] RRTA 423 (22 July 2008)

DECISION RECORD

CASE NUMBER:	0803250
COUNTRY OF REFERENCE:	South Africa
TRIBUNAL MEMBER:	Louise Spieler
DATE DECISION SIGNED:	22 July 2008
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

In accordance with s.431 of the *Migration Act 1958*, the Refugee Review Tribunal will not publish any statement which may identify the applicant or any relative or dependant of the applicant.

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.
2. 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 the applicant applied to the Tribunal for review of the delegate's decision.
3. The Tribunal finds that the delegate's decision is an RRT-reviewable under s.411 of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

4. 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.
5. 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'

6. 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.

7. 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.

8. 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.

9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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

16. The Tribunal has before it the Department's file relating to the applicant.

17. *The protection visa application:* In his protection visa application, the applicant stated that he was born in South Africa. He stated that he was employed by a company between the late 1980s and late 1990s and thereafter until the early 2000s he owned a business. The applicant stated that thereafter he departed South Africa and since arriving in Australia he has returned to South Africa on several occasions.

18. In statements submitted with the application, the applicant outlined his reasons for leaving South Africa. He indicated that there was a car theft in his area carried out by a group and one person was killed. The police caught the people involved and discovered that his wife's vehicle was going to be stolen. A person came to her workplace looking for her but fortunately she was not in. In addition, there were laws regarding affirmative action and black empowerment in business. As a result, he and his wife decided to leave South Africa in order to seek a better future for themselves

and their children. He promised his parents that he would come and visit them regularly so they could see their grandchildren.

19. As to what may happen to him if he has to return to South Africa, the applicant stated that it would be very difficult to get work because of the affirmative action law which results in discrimination against white males over a particular age. In addition there is no social security or medical help for white males. The crime rate is high and it is unsafe to live in South Africa. Relative 1 was held up and Relative 1's vehicle was stolen. The police discriminate against whites and do not attend to their calls; they may mistreat or harm him. The applicant stated that since he has been in Australia his wife has divorced him and she and his children now have permanent residence. One of his "greatest fears" is that he will not see his children for a long time.

20. Documents submitted with the application show that the applicant's spouse and children were granted particular types of visas. The applicant and his spouse were divorced.

21. *The Tribunal application:* In a number of statements and an affidavit submitted with the review application, the applicant outlined his claims in similar terms to those made to the Department. He stated that he and his wife decided to seek a better life and opportunities in Australia taking into account affirmative action, crime and the future of their children. He reiterated that because of affirmative action it is impossible to get work in South Africa if you are over a particular age and a white male. White businesses and workers are targeted in order to rectify the wrong doings of the apartheid era. If he has to return to South Africa he will be targeted and discriminated against. In addition crime is a big reality and concern.

22. The applicant stated that after his arrival in Australia his marriage broke down and his wife obtained a divorce. He was shocked when she obtained permanent residence for herself and his children. He decided to apply for a protection visa not only for his protection but also for his children. It is wrong to separate children from their parents and grandparents. He sees it as a humanitarian issue.

23. Documents submitted with his application included an article from *Harvard International Review* titled "Righting wrongs: affirmative action in South Africa", and an article from *The Citizen* dated 25 May 2008 titled "Zuma 'to rethink affirmative action'".

24. *The Tribunal hearing:* A hearing was set down. The applicant attended the hearing and gave oral evidence.

25. The applicant confirmed that he arrived in Australia in the early 2000s as a dependant of his wife who was the main applicant for a particular type of visa. His wife and children have subsequently been granted permanent residence

26. The Tribunal enquired about the applicant's life in South Africa prior to his departure for Australia. He said that he ran his own business for several years. As to whether he experienced any problems during this time, the applicant said that a friend of his was killed. The police caught the offender. His wife's vehicle was going to be stolen. A person came to her office and asked about her. As a result of this incident his wife did not feel safe and they decided to come to Australia. The applicant said that Relative 1 was also attacked and Relative 1's vehicle stolen.

27. The Tribunal asked if the applicant knew or suspected the reasons for the violence and theft he had referred to. He said that there was a group who were focussing on particular vehicles

28. As to any other problems he experienced, the applicant referred to the government's affirmative action policy. The Tribunal asked whether this had affected him personally. The applicant said that prior to working in his business he had worked for a company in a managerial position. In the mid 1990s, the company started appointing people to positions because of

affirmative action and he felt he didn't have a future in the company. In addition he had to travel regularly and he wanted to settle down. He left voluntarily to open his own business. The Tribunal asked the applicant whether he was ever denied a promotion while at that company. He said that it was not said to him directly, but other people were appointed. When asked to explain he said that other people in his position were given the opportunity to do other things and he was due to be given this opportunity but in the mid 1990s this was put on hold. Only one person was given the opportunity. The Tribunal asked if that person got the opportunity because of affirmative action policy. The applicant said that he wasn't; he was a white person.

29. The applicant said that it was one of the conditions of coming to Australia that they would return to South Africa regularly to visit his family. The family went back together the first time but after that there were problems between himself and his wife.

30. The Tribunal asked the applicant why it took him several years to lodge his protection visa application. In response, he told the Tribunal about his marriage breakdown. Some time after arriving in Australia they separated. They tried to reconcile without success. His wife applied for permanent residence but did not tell him. Once he found out that she obtained permanent residence he went to the Department and asked what he should do. Nobody was helpful and time was running out. His visa was due to expire. He did his own research and found out about a protection visa and decided to apply. One of the main reasons is to stay in Australia with his children. The visa would offer protection for him and his children.

31. As to what would happen to him if he had to return to South Africa, the applicant said that affirmative action is a political and racist policy. He said that he will not receive a pension or social security. The Tribunal asked whether he received money from the company. He said that he did. He has some insurance policies, which will be paid out when he is older.

32. The Tribunal observed that the applicant had a good work history in South Africa and asked why he thought he would be unable to obtain employment. He said that according to his friends, no account is taken of experience. Under affirmative action it is enough if a person has the potential to do the job. The policy targets white males over a certain age, generally persons who were in the army in the apartheid years.

33. The applicant said that if he has to return to South Africa he will have to rely on his family to support him. His parents have limited resources. He is trying to get a financial settlement from his wife and the minimum he expects to receive would probably just cover the debts he has accumulated in Australia. After having lived in Australia for over several years it will be hard to get used to the violence again. The applicant reiterated that his greatest fear is for his children and how and when he will be able to see them. He wants to make a future with them in Australia.

COUNTRY INFORMATION

34. *Human Rights Watch's World Report: South Africa 2007* noted that "Emerging from a history of institutionalized racial inequality, South Africa has made admirable progress in transforming the state and society to ensure respect for fundamental rights, including freedom of expression, an independent judiciary, and free and fair elections. Nevertheless, widespread poverty, unemployment, persistently high levels of violent crime, and gender inequality continue to inhibit the full enjoyment of human rights".

35. In respect of crime, the *US Dept of State Country Report on Human Rights Practices - South Africa 2007* reported that "incidents of vigilante violence and mob justice continued, particularly in Gauteng, the Western Cape, and KwaZulu-Natal... There continued to be violent attacks on foreigners, especially immigrants from neighboring countries... Killings and other violent crimes against farmers and, on occasion, their families, continued in rural areas. Despite

concern among white farmers that they were targeted for racial and political reasons, studies indicated that the perpetrators generally were common criminals motivated by financial gain”

36. In an article published by the South African Institute of Race Relations on 9 April 2008 (accessed at www.sairr.org.za), John Kane-Berman noted that “even though the vast majority of violent crimes are not committed across the colour line and even though few inter-racial crimes are proved to have racial motives, there appear to be widespread perceptions that violent inter-racial crimes do have a racial motivation. To ascertain whether these perceptions are well-founded or not is impossible.”

37. In respect of the police, the *US Dept of State Country Report on Human Rights Practices - South Africa 2007* reported that the “South African Police Search (SAPS) continued its major restructuring and transformation from a primarily public order security force to a more accountable, community-service-oriented police force; however, it remained ill-equipped, overworked, and poorly trained.”

38. According to the *US Department of State Background Report* (April 2008), the population of South Africa is 79.7% black; 9.1% white; 8.8% coloured; and 2.2% Asian (Indian). The *US Dept of State Country Report on Human Rights Practices - South Africa 2007*, noted that “the law requires employers with 50 or more employees to ensure that previously disadvantaged groups, legally defined as “Blacks” (including “Africans,” “Colored,” and “Asians,” and collectively constituting more than 90 percent of the country's population) are represented adequately at all levels of the workforce. Notwithstanding the country's antidiscrimination legislation, however, the Department of Labor's (DOL) 2005 “Employment Equity Analysis” reports that Blacks remained underrepresented, particularly at the professional and managerial levels. According to that report, only 28 percent of top management positions, and approximately 53 percent of professional positions, were held by Blacks. The report makes it clear that Black women remained by far the most disadvantaged in terms of the number and quality of management or skilled jobs”.

39. In an article submitted by the applicant, it was noted that “redistribution legislation has made it more difficult for skilled white workers to find work” (Natasha Kovacevic, “Righting wrongs: affirmative action in South Africa”, *Harvard International Review*, 22 March 2007).

FINDINGS AND REASONS

40. Based on the information on the applicant's file, which includes a copy of his passport, the Tribunal finds that the applicant is a national of South Africa.

41. The applicant claims to fear persecution because of his race and his membership of a particular social group, namely white males over a certain age. In addition, he claims to fear persecution because of the high crime rate and impending separation from his children. However, the mere fact that a person claims fear of persecution for a particular reason does not establish the genuineness of the claim or that it is “well founded” or that it is for the reason claimed. The Tribunal is not required to accept uncritically the assertions made by the applicant (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596) and it remains for the applicant to satisfy the Tribunal that the statutory elements are made out.

42. In this case, the Tribunal has doubts as to whether the applicant has a subjective fear of persecution for a Convention reason. The Tribunal notes, firstly, that he accompanied his spouse to Australia in the early 2000s on condition that they return to South Africa regularly to visit his family. Since then, the applicant has returned to South Africa on several occasions (his family accompanying him on one trip). He did not lodge his protection visa application until several years after his arrival and a short time prior to the expiry of his valid visa. While the applicant's willingness to return to South Africa, together with the substantial delay in lodging his protection

visa application, raises doubts as to the genuineness of his fear of persecution, the Tribunal has nevertheless proceeded to consider whether, if held, there is a sufficient basis for such fear.

43. In respect of his race, the applicant claims to have been adversely affected by South Africa's affirmative action legislation which was introduced to facilitate the effective participation of black people (so defined) in the economy. There is, however, little evidence before the Tribunal to suggest that the applicant has been so affected. In an affidavit submitted to the Tribunal the applicant stated that when he met his spouse he "was working with the company and owned a house". At the Tribunal hearing the applicant indicated that he may have been denied a promotion due to affirmative action but when invited to explain further he said that all promotions were put on hold and only one person, a white person got it. He confirmed that he left the company he worked for voluntarily to start his own business and that he received money from the company. While the applicant claims that he would have great difficulty in getting a job on his return to South Africa due to affirmative action, the Tribunal considers that there is no substantial basis for this claim and finds that it is merely speculative.

44. But in any case, even if the Tribunal were to accept that affirmative action legislation would make it more difficult for the applicant to secure employment on his return to South Africa, the Tribunal is not satisfied that any such difficulties would constitute "serious harm" such as to deny the applicant the capacity to earn a living of any kind or otherwise constitute an interference with his basic human rights and freedoms. For these reasons, the Tribunal does not accept that the applicant faces a real chance of persecution as a result of South Africa's affirmative action legislation.

45. The applicant claims, in addition, that he has been affected by crime in South Africa. While not explicitly put by the applicant, it was implicit in his claims that whites are targeted. He stated that in such circumstances he would be denied the protection of the police and may in fact be mistreated by them. While the Tribunal accepts that there is a high level of crime and violence in South Africa, country information does not support a conclusion that, generally speaking, crime is racially motivated; rather it is generally motivated by a desire for financial gain. The applicant's own evidence to the Tribunal in respect of the potential hijacking of his spouse's car was in fact consistent with country information. There is little evidence to suggest that the applicant's spouse was targeted because of her race, rather it was because she owned a particular motor vehicle that was sought by the group. Contrary to his claim that the police do not respond to calls by white persons, it is clear that they apprehended the group responsible for the car thefts and in doing so managed to prevent the theft of his spouse's car. For these reasons, the Tribunal does not accept that the applicant has suffered in the past from racially motivated crime or that there is a real chance he would suffer from racially motivated crime in the future.

46. While the Tribunal accepts that the applicant holds fears that he may suffer serious harm as a result of a random criminal act or a criminal act perpetrated for a non-Convention reason, he is not entitled to refugee status on that basis alone (James Hathaway, *The Law of Refugee Status*, Butterworths, Canada, 1991, p93). The Tribunal is satisfied that the government does not tolerate or condone such criminal activity and, notwithstanding a shortage of resources, the police force is attempting to address this issue. The Tribunal is satisfied that the services of the police would be accessible to the applicant as they have been in the past and that such assistance would not be withheld because of the applicant's race.

47. The applicant also claims that as a white male he would be denied medical treatment and social security. He has not expanded on these claims, and there is no information before the Tribunal to indicate that he would be denied essential services or otherwise face any discrimination in this regard due to his race or membership of a particular social group.

48. It is reasonably clear that the applicant's greatest fear relates to the prospect of being separated from his children. While the Tribunal accepts that the applicant's fear in this regard is sincerely held, and that if returned to South Africa he may be deprived of the opportunity to maintain a close personal relationship with his children, this is not a matter which comes within the scope of the Convention. Any fears that the applicant may hold in this regard are not for a Convention reason and do not involve conduct carried out by the State (South Africa) or non-state agents.

49. Having regard to the evidence before it, the Tribunal is not satisfied that the applicant has suffered serious harm in South Africa as a result of his race, his membership of a particular social group or for any other Convention related reason. Nor is the Tribunal satisfied that the applicant faces a real chance of serious harm for a Convention related reason were he to return to South Africa now or in the reasonably foreseeable future.

50. The Tribunal is therefore not satisfied that the applicant has a well-founded fear of persecution within the meaning of the Convention.

CONCLUSION

51. Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant does not satisfy the criterion set out in s.36(2) for a protection visa.

DECISION

52. 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*.

Sealing Officer's I.D. ahead