

061051351 [2007] RRTA 15 (2 February 2007)

DECISION RECORD

RRT CASE NUMBER: 061051351

COUNTRY OF REFERENCE: Indonesia

TRIBUNAL MEMBER: Mr S Norman

DATE DECISION SIGNED: 2 February 2007

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 a citizen of Indonesia, arrived in Australia and applied to the Department of Immigration and Multicultural Affairs for a Protection (Class XA) visa. He was initially granted a Temporary Protection visa. The delegate subsequently decided to refuse to grant the Permanent Protection visa and 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, in this case 1 August 2006, although some statutory qualifications enacted since then may also be relevant.

Section 36(2) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. 'Refugees Convention' and 'Refugees Protocol' are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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

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

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 205 ALR 487 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act now qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

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

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

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

By virtue of s425(1) of the Migration Act, the Tribunal must invite an applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to a decision under review. Subsection (1) does not apply *inter alia*, where the Tribunal considers that it should decide the review in the applicant's favour on the basis of material before it (s425(2)(a) of the Migration Act). The Tribunal is satisfied it should decide this review in favour of the applicant on the basis of the material before it. Accordingly, the applicant has not been invited to a hearing.

The Tribunal has before it the Department's file relating to the applicant. The Tribunal has also had regard to other material available to it from a range of sources.

The applicant lodged a Protection Visa application with the Department. He claimed to have received 12 years education, to have left Indonesia legally after having 'spent a lot of money for [his] passport'. A dated letter, by his migration agent, submitted the applicant was Acehenese, single and his father had been killed by the Indonesia military. His mother and siblings remained in Indonesia and he was a Muslim.' It was claimed the applicant was 'actually born in [location] on [date]' and he was a '[role] for Free Aceh Movement (GAM).' It was claimed the applicant's father was also undertaking this role for GAM. The applicant was 'offered the job' (his role) by a friend of his fathers. The applicant's named 'superior... was arrested and some documents/letters were also taken from him. The applicant claims his name was in it as a [role undertaken]. It happened in [date]. The applicant was afraid as he knew the TNI would arrest him and torture...and kill him...The applicant claims he went to [City Y] as soon as he knew [his superior] was arrested. In [City Y] he lived from place to place. In [City Y] visitors have to report in 24 hours...The applicant claims he heard from a friend who was a bus driver [route] that the TNI had threatened the applicant's family. They would burn the family stall and would kill one of the applicant's siblings in place of the applicant if he did not surrender himself.'

A Department delegate refused to grant the applicant a Protection Visa (DIMA file f.44).

The Refugee Review Tribunal (differently constituted) remitted the matter to the Department with the direction the applicant 'is a person to whom Australia has protection obligations under the Refugees Convention.' **The applicant was then granted a Temporary Protection visa.** Amongst other things, the previous Tribunal accepted the applicant was Acehenese; that his father had undertaken a specific role for GAM and had been killed; that the applicant had been injured at a demonstration against the Indonesian military (though never arrested or detained); that the applicant had undertaken a specific role in GAM when his mentor had been arrested; that after this he had lived apparently as a student for a number of months in City Y without being harmed, harassed or even questioned; that he left Indonesia legally by means of a passport that did not identify him as Acehenese; [information deleted in accordance with s431 of the Migration Act].

At the previous Tribunal hearing the applicant had presented documents in support of his claim to have entered Australia on false identity papers/travel document (DIMA file f.101). After being accepted to be a refugee the applicant advised his given names as **Person X**. Prior to that time he had only provided the name **Person Z** (DIMA file f.68). By dated letter from his migration agent, it was also claimed 'Mr [Person Z] [was] also known as [Person X]' (DIMA file f.84). It was noted that since arriving in Australia the applicant had obtained identification and other financial accounts in the name of **Person Z**. At any rate the applicant was issued with an 'Article 28 travel

document' (DIMA file f.106). This document had been issued once the applicant had been granted his Temporary Protection Visa.

Through his new migration agent, the applicant **lodged an application for a Permanent Protection Visa**. By statutory declaration, in support of that application, the applicant claimed he continued to fear persecution for his 'previous and ongoing support for independence in [his] native province of Aceh.' The applicant claimed he read a named Indonesia newspaper; participated in peaceful discussions 'held on an irregular basis'; that he remains committed to the independence of Aceh 'in spite of what was agreed upon by the GAM negotiators'; on one occasion (after the December 2004 tsunami) he participated in an organised activity; he feared being arrested and interrogated and 'physically and psychologically harmed' in Indonesia (eg by being beaten and insulted without charge); he feared he would be gaoled for treason for reason of his known support for independence of Aceh 'in the lead up to [his] escape' from Indonesia; that his support for GAM is seen as an act of treason by the Indonesian security authorities; that he does not support the abovementioned agreement (' by the GAM negotiators') as it 'does not honour the sacrifices made by those who lost their lives'; he called his family 'once per month' but did not speak about 'anything about [his] political activities in Indonesia or Australia'; his family made no mention about being harassed but he believed they 'would not risk talking about it on the phone even if there had been any episode of harassment'; and he provides financial support for his family.

By a further dated statutory declaration, the applicant claimed his father and many other Acehenese had given their lives in support of the original 'ideals'. He claimed to continue to attend meetings in support of Acehenese independence and claimed his photograph had been taken while he was attending a demonstration. The applicant did not know the identity of the man who had taken the photo; the man had been 'standing behind the embassy fence.' He feared his photo had been passed on to the Indonesian authorities; and these authorities were 'very sensitive about any public protests...especially when these protests are brought to international attention'. The applicant also claimed to fear being questioned about his illegal departure from Indonesia; that his political asylum in Australia will then be brought to the attention of the Indonesian authorities; and this would enhance the risk of harm to him. The present Tribunal also viewed photocopies of photos purporting to be the applicant attending demonstrations in support of Aceh independence in Australia.

Further country information and submissions were considered by the Tribunal prior to drafting its below Findings and Reasons.

The Department delegate refused to grant the applicant a (Permanent) Protection Visa.

The applicant lodged an application for review of that decision to the Refugee Review Tribunal.

FINDINGS AND REASONS

The Tribunal is aware the applicant entered Australia on a false passport. That said, based on the information it has considered, it is satisfied there are reasonable grounds to find the applicant is a national of the Republic of Indonesia (Indonesia) as claimed. In an effort simplify my further Findings and Reasons I have set them out under the below sub-headings.

Persecution:

Based on his evidence (ie he claimed to fear being arrested, detained and physically and psychologically mistreated in Indonesia), I am satisfied the harm the applicant is claiming to fear would at least constitute significant physical harassment of the person or significant physical ill-treatment of the person (see s91R(2)(b) & (c) Migration Act). Accordingly, I am satisfied the harm the applicant claims to fear is sufficiently serious to constitute persecution for the purposes of the Refugees Convention.

Convention ground:

The claimed fear of persecution must be for reasons of one of the grounds set out in the Refugees Convention. The present applicant has claimed to fear harm from the Indonesian authorities arising from his support and activism on behalf of GAM, both in Indonesia and Australia. The present Tribunal believes it entirely uncontroversial to find the applicant fears persecution for reason of his political opinion.

Well founded fear:

I need now consider whether the applicant has a real chance of being subject to the persecution feared. A real chance is not a remote chance; there needs be real substantial basis that an applicant would be subject to the persecution feared.

The Tribunal carefully read the delegate's decision. The Tribunal believed that decision to have been well reasoned and well written. Further, much of the country information considered by the Tribunal supported the conclusion reached by the delegate. That said, the applicant had claimed *inter alia* he continued to attend meetings in support of Acehnese independence and claimed a photo of him attending a demonstration. He feared his photo had been passed on to the Indonesian authorities; and these authorities were 'very sensitive about any public protests...especially when these protests are brought to international attention'. The applicant also claimed to disagree with the terms of the current peace agreement and feared he may even come into conflict with other GAM members in Aceh.

Country information considered by the Tribunal include that There developments relating to the signing of the Law on Aceh Governance in July 2006 have been widely reported, though reports also indicate a number of uncertainties in relation to how the new laws will operate and be received:

The chances of lasting peace in Indonesia's unhappy northern province of Aceh brightened on July 11th. A law was passed granting it generous autonomy, as promised last August in a pact between the government and the separatist Free Aceh Movement (GAM), which formally ended a 29-year armed struggle. According to the new law, the Acehnese will receive tens of millions of additional dollars from the government; they will keep 70% of the revenue from their large oil and gas reserves; and they will have a bigger say in the running of their province. For the first time in Indonesia, local political parties will be allowed in Aceh. Since these will not be formed in time to contest provincial elections expected in November, individual candidates will be allowed to stand as independents, another first for Indonesia.

Many Acehnese politicians reckon all this has satisfied about 90% of their demands. Others are less content. GAM has lingering concerns over whether the

government will honour its agreement. And many Acehnese are furious that a promised human-rights tribunal will have no powers to investigate crimes committed during the long conflict. Some Acehnese fears are more personal. Many women, for instance, predict that the formal adoption of Islamic law, another fruit of the peace agreement, will erode their already meagre rights. But these objections are most unlikely to scupper the agreement. A provincial strike, called by some dissidents on July 11th, was scantily observed, reflecting broad support for the peace process. Moreover, ministers in the central government have also promised to amend the law if it is seen to have failed to satisfy the demands of most Acehnese.

A more pressing threat to Aceh's prospective stability has been posed by a spate of crime, including five murders, this month. Analysts say this may indicate disgruntlement among many low-level ex-GAM members, in particular over the failure of government peace-making incentives to reach them. The government sent half the sum earmarked for ex-militants to GAM's district leaders. But it has withheld the rest until those leaders submit lists of recipients' names. These lists have yet to be sent; some former fighters are turning to crime to survive. Compounding the dissatisfaction with the scheme is more general unhappiness with the pace of rebuilding the ruins left by the December 2004 tsunami, which devastated most of Aceh's coastal communities. Still, without the disaster, it is unlikely that the government and militants would have made peace.

There are also fears over what may happen after a European Union-led peace monitoring mission leaves Aceh in September. The EU group has done well to maintain relative tranquillity, and has moderated various local disputes competently. But it has failed to establish a local successor ahead of its departure. Unless it finds an appropriate body soon, there is a real danger that all its good work will start to unravel towards the end of the year. ('Brightening Skies over Aceh', *The Economist*, 13 July 2006)

With respect to the withdrawal of the international monitors:

Human rights protesters demonstrated in Indonesia's Aceh province on Thursday, urging international monitors overseeing a historic peace deal between the government and separatist rebels to stay on... Thirty-five remaining European and Asian monitors grouped under the Aceh Monitoring Mission (AMM) are due to leave the province on Friday, ending a 15-month stint there'

(CX167245: INDONESIA: Protesters urge monitors to stay in Indonesia's Aceh, Internet site: Alertnet, www.alertnet.org, 14 December 2006).

Of relevance to the Tribunal's review are reports that relate to claimed factional splits within GAM. Dr Sidney Jones of the International Crisis Group (ICG) reported in September 2006 to the press about the recent splits in GAM, and the ICG examined the issue of factional splits in greater detail in its briefing notes on the December 2006 elections:

That rift, which GAM spokesmen call "differences of opinion", pits the old guard leadership that was based in Sweden throughout the conflict against younger figures who stayed in Aceh and fought. It erupted into the open in mid-2006 as the organisation sought to set political strategy and decide on candidates for the

elections. In Aceh, unlike other parts of Indonesia, candidates without party affiliation are allowed, enabling GAM members to stand as independents. The old guard supported one party-backed slate for governor and deputy governor, the younger leaders an independent ticket. One of the candidates was physically attacked by his rival's supporters on 22 November in Bireuen, Aceh. On 27 November, in what initially seemed an effort at reconciliation, GAM announced at a press conference that it would stay neutral as an organisation. In fact, the division remains deep and could affect not only these elections but GAM's plans to build its own political party. The split is significant because so much hangs on the December poll. For GAM itself, the elections are a test of political strength and an indication of how much work it will have to do to win the much more important 2009 elections, when seats in the provincial parliament will be at stake. Senior GAM strategists believe that if they can control that parliament, they can set the political agenda for Aceh's future. In this sense, the December elections are a dry run, and it will not be disastrous if they lose most races, as long as they can get a respectable percentage of the vote.

For the armed forces and many Jakarta-based officials, the polls are a test of GAM's good faith. Will GAM candidates refrain from using the separatist flag or suggesting that independence is just around the corner? Senior military officers make little effort to disguise their suspicions that GAM is exploiting the peace to rebuild and regroup and is only paying lip-service to Indonesian sovereignty. (The regional military commander wanted all GAM candidates to swear an oath of loyalty to the Indonesian state but was persuaded to drop the idea.) For many Acehnese in former conflict areas, the elections are a gauge of whether the peace will hold. An IFES survey conducted in September-October 2006 suggested 93 per cent of Acehnese believe the elections will help secure the peace but 55 per cent are concerned about violence, whether by ex-GAM, ex-militias, government security forces or political party supporters.

Before the incident in Bireuen, there were fears that the military or intelligence service would prevent a GAM victory; that GAM would use intimidation and threats; and that long-dormant militias would reemerge as goon squads for non-GAM candidates. Now there are fears of intra-GAM violence as well, although both sides insist there will be no repeat of the 22 November attack, and the first days of the formal campaign, which began on 24 November, have gone smoothly. ('Aceh's Local elections: The Role of the Free Aceh Movement (GAM)', International Crisis Group, Asia Briefing 57, Jakarta/Brussels, 29 November 2006).

Dr Edward Aspinall, a leading expert on GAM from the Australian National University, has commented to the Tribunal on the split within GAM, and on the risks of a GAM supporter who continued to advocate independence suffering harm:

There is indeed a split among former supporters of Free Aceh Movement (GAM) outside the country about the Helsinki Peace Agreement, with one (relatively small) group continuing to support independence for Aceh. This split partly continues an early and very bitter division in the movement which developed some years ago between a group called MP-GAM and the mainstream GAM (the mainstream was led from Sweden by individuals like Malik Mahmud and Zaini Abdullah). This split led to bitter acrimony and at least one murder in Malaysia.

Many (though not all) of the group who now criticize the Helsinki peace agreement and condemn the mainstream GAM leadership for supporting it, were formerly supporters of MP-GAM. For your information, I paste below a declaration made earlier this year by supporters of this group. From my own associations with members of the Acehnese community in Sydney, I am aware that several members of the Acehnese community in Australia are affiliated with this group (or at least share its views) and continue to support Acehnese independence.

This split is separate from the one which Sidney Jones refers to. That split has occurred in the mainstream GAM ranks – ie among those who support the Aceh peace process. There is considerable bitterness here, too, and I have read some reports about intimidation and minor violence resulting from it, but not of very serious violence (e.g. killings). This does not mean that such violence has not occurred, just that I haven't heard about it.

I do not know if the history of tensions within GAM referred to in point 1 above would put someone who was affiliated with the minority position (ie support for continued independence) at risk of violence from other GAM members if he/she returned to Aceh. I certainly could not rule that out: certainly at the height of the conflict, there were many rumours of such violence taking place and I have heard GAM members themselves say at that time that they would kill members of MP-GAM they found in Aceh. I do not know to what extent that rancour and hostility continues into the post-peace agreement climate. Discussions among Acehnese on various email lists I am party to do reveal that there is much continuing bitterness; it may be possible that this would lead to violence, though I cannot say for sure.

I believe that any person who returned to Aceh and campaigned for the independence of Aceh would be at serious risk of arrest. The peace agreement has been possible only because GAM gave up its support for independence. In other parts of Indonesia, advocates of independence for various regions continue to be arrested for violating makar (treason) provisions of the criminal code. Government security force leaders in Aceh have stated at various times that they are suspicious of, and would like to take action against, former independence supporters who now endorse the peace process, but they have been constrained by the fact that all such persons have carefully avoided stating their support for independence. It is thus very likely that if a person was to openly advocate independence, that security forces would find it politically expedient to make an example of such a person. (Aspinall, E., 'Factional splits in GAM', 9 November 2006).

Dr Aspinall's comments are echoed to some extent by comments made by another GAM expert, Deakin University's Associate Professor Damien Kingsbury. He has advised that he does not 'believe that anyone has anything to fear from either faction of GAM', though 'if Acehnese do advocate independence, they might be persecuted by police or soldiers' (Kingsbury, D., 'Factional splits in GAM', 30 October 2006).

Based on the country information considered, I am satisfied the present applicant's fear of persecution is well founded. I am satisfied, the applicant's continuing profile in Australia, the splits in GAM, the uncertainty still remaining in Aceh, the recent departure of international

monitors, and the mere 18 months since the cessation of the 30 years of hostilities in Aceh, means there is a real substantial basis for finding the applicant's fear is well founded. Accordingly, I am satisfied the present applicant has a well founded fear of persecution for reasons of his political opinion in Indonesia.

Finally, based on the country information considered, I am satisfied that relocation is not a safe option for this applicant.

Accordingly, I am satisfied the applicant has a well founded fear of persecution for a Convention reason in Indonesia.

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.

<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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