

0900523 [2009] RRTA 849 (15 September 2009)

DECISION RECORD

RRT CASE NUMBER:	0900523
DIAC REFERENCE(S):	CLF2008/147142
COUNTRY OF REFERENCE:	Malaysia
TRIBUNAL MEMBER:	John Atkins
DATE:	15 September 2009
PLACE OF DECISION:	Melbourne
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 Malaysia, arrived in Australia [in] December 2005 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] October 2008. The delegate decided to refuse to grant the visa [in] December 2008 and notified the applicant of the decision and his review rights by letter dated [in] December 2008.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] January 2009 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

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

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department'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.

The Application

20. The applicant claims to be 44 years of age having been born on [date deleted: s.431(2)] 1964 in Sarawak, Malaysia.
21. The applicant claims to be a Christian. The applicant made the following claims in his protection visa application:
 - He has been discriminated against by the Malaysian government because of his Chinese ethnicity.
 - Preferential treatment is given to the ethnic Malay majority in Malaysia.
 - He is unable to get work in government.
 - His own business failed because of the discrimination by the Malaysian government and the ethnic Malay majority against the Chinese.
 - If he has to go back to Malaysia he would be unable to support himself or his de facto and her child as it would be impossible for him to get work and therefore he would have nowhere to live and have enough food to exist.
 - There is no future for him in Malaysia.
 - He was denied the opportunity to earn a living and to be treated equally in employment and business.
 - The Authorities in Malaysia would not protect him as they instigate the discrimination against the ethnic Chinese.

The Hearing

22. The applicant appeared before the Tribunal [in] April 2009 to give evidence and present arguments. [Person 1], the applicant's former employer gave evidence in support of the applicant.

23. The applicant said that he commenced work as a part time teacher in his final year of secondary school in 1983. The applicant said he had been interested in studying teacher training and thought it was a sound idea to get some work experience prior to commencing the course.
24. The applicant said he applied 3 years in a row to [organisation deleted: s.431(2)] in Sarawak He said his academic results were sufficient to gain entry to the course However he claimed only 3% -5% of Chinese students were selected to receive government scholarships as most places went to Malay students.
25. The applicant said that his parents couldn't afford to pay his fees in tertiary education. His income was about \$250 per month as a part-time teacher. He obtained a position as a logging camp supervisor in December 1984 earning \$1500 per month.
26. The applicant said he was the youngest of eight siblings. His parents were comparatively poorly educated and emphasised to the applicant that education was the path to a better life.
27. The applicant claimed that the government of Malaysia discriminated against Chinese people since Malaysia gained independence. The Tribunal put to the applicant that country information reports suggest that the Chinese population in Malaysia comprise 20-25% of the population and control 60% of the wealth to which he agreed.
28. The applicant said that 95% of University places went to Malays, while the remainder of places went to Chinese Indian and Indigenous people. He claimed it was hard to get accurate reports in the press which is controlled by the Malays, and that is why there are very few reports of discrimination in the newspapers.
29. The applicant said he had started his own business as a logging contractor in Sarawak. He did some contract work with the government when he started, he said things changed and the government required him to sell 51% of his business to a Malay partner. He said the business for logging contractors became increasingly difficult as the forests were being cleared. After about 6 years he sold up to his Malay partner. He had found it increasingly difficult to make money in the timber industry. He sold his share of the company for \$60,000.
30. He got into the fishing industry following the sale of his logging business. He employed others to work on his fishing boat while he sold fish at the markets. He said his father in law had been involved in the fishing industry and gave him some assistance. He could not get a permit in his own name and said fishing permits are controlled by the Malays, and had to rent permits from the Malays. In 2004 he sold out, and prior to coming to Australia he worked part-time in the fish markets selling fish In 2005 he came to Australia and did a bit of travelling for four or five months before he got a job at [Company A] where [Person 1]'s family conduct business as orchardists.
31. The applicant said he was married in 1984 and has 3 children. He is now divorced his children are all grown up, he didn't mention his children on his application as he didn't think it was relevant. Two of his children are at University on the Malay Peninsula. One daughter is studying Hospitality. His son has left home and is working at the fish market, where the applicant had previously worked.

32. The applicant claimed that he had previously applied for a Temporary Business (Long Stay) subclass 457 visa, in March 2006 He was to be a farm overseer, he did a certificate IV in Horticulture at [Location A] He said [Person 2] was his former solicitor and Migration agent handling that application. He had come to Australia on a visitor visa, in 2005. He didn't apply for a protection visa when he came to Australia he relied on advice from [Person 2] to apply for a class 457 long stay business visa. He worked as farm overseer from March 2006 to October 2008. The Tribunal asked why he didn't apply for a protection visa instead of a 457 visa. He said that "at the time I was unsure that Malaysia was in a situation or that I was in a situation to be eligible to apply for this visa. So what my employer and solicitor said was to apply for a 457 visa".
33. His de facto has two children from her former marriage and she has gone back to Malaysia. She was a part time dressmaker working from home. They lived together for six months prior to coming to Australia together. He said his de facto returned to Malaysia to attend her brother's funeral. One of her children is an Engineer working for Singapore airlines, after attending University in Malaysia. The other child he described as a part time job seeker at the age of 25.
34. In 1992 the applicant had a working holiday in Vanuatu, his company was to have undertaken logging work but was refused a work permit. He stayed there for about a month but did not work.
35. He said it would be hard to get work in the government sector, he said that if he went back after 4 years he would find it difficult to get work in the logging industry, and he doubted he would be able to get work as a fisherman. He said he would be unable now to get fishing permits, in Malaysia. He said it was quite difficult to get work because he is Chinese. He claimed he wouldn't be able to get a proper job that would allow him to feed his family.
36. He complained that the Malaysian government gave preference to Malay people. He said he is out of work in Australia for the last six weeks, the house where he lives belongs to a former colleague who used to work at [Company A]. He said he is a hard working person who enjoys working for [Person 1] and has the advantage of being able to speak English and Chinese.
37. The applicant claimed the press was controlled in Malaysia by the Government. He referred to internet reports from Malaysia of discrimination against Indian people. He did not refer to any reports of discrimination against Chinese people. He referred to a Hindu temple being destroyed by police.
38. The Tribunal invited the applicant to provide any internet articles referring to discrimination against Chinese people in Malaysia, within 14 days of the hearing. The applicant has not provided any additional material since the hearing.
39. He said that Chinese primary schools in Malaysia had been closed down. He agreed that the government is not preventing Chinese children from attending school. He said that while he attended a Chinese primary school, but at the time he did not learn Chinese, he did learn Malay and English.

40. He said he was a Methodist in Sarawak and churches were hard to find in Malaysia. He claimed Christians had to travel a long way to get to a Church. Whereas he said there was a Mosque in every village. In Australia he attends the Baptist church in [Location B], he said that church has a mixed race congregation. He prefers the Church at [Location B] to that of the Uniting Church in [location deleted: s.431(2)] which is much closer to home. He said that the [Location B] church sometimes holds services at [Location A] in a hall near the railway station.
41. The Tribunal put to the applicant that while he had made some complaints of ethnic or racial discrimination, he had not made any real complaint of religious discrimination. He referred to discrimination when he wanted to go to University, however he has two daughters at University and his defacto son attended University and got a good job in Singapore. His former wife works as a dressmaker earning enough to support herself and help support her children.
42. [Person 1] is an orchardist. He has known the applicant since 2006 when he came to work for him, he assisted the applicant in seeking a 457 visa which did not succeed as he claimed Horticulture was not recognised as skilled labour. The applicant has obtained a certificate IV in Horticulture. He said the applicant is a good worker, he has all the qualities and skills to make a good overseer. He said the applicant has appeared with him on the TV show [title deleted: s.431(2)] talking about his problems in trying to find decent workers. [Person 1] said he couldn't give any evidence about his persecution claims in Malaysia.
43. The Tribunal has perused the file for the applicant's 457 Long Stay visa. Unfortunately for the applicant the business nomination for Production Horticulturist was refused [in] February 2008, the activity for which the applicant was being sponsored was not the subject of an approved nomination.
44. Country Information available to the Tribunal Indicates that ethnic Chinese constitute approximately 25% of the population. They are economically well off compared to other ethnic groups according to a 2007 Immigration and Refugee Board of Canada report:
there are four Chinese –language newspapers in Malaysia (US6 Mar.2007, Sec2a). Media sources indicate that Malays of Chinese origin “dominate” the business sector (AFP29 Aug2005; *Asia Times Online* 24 Mar. 2006; Reuters 24 Aug 2005). As well, the Malaysian Chinese Association (MCA) is a political association which is part of the governing National Front (Barisan Nasional, Bn), a coalition of 15 parties (Freedom House2007) (Immigration and Refugee Board of Canada 2008, *MYS102643.E-Malaysia : Reports of discrimination against Malaysians of Chinese descent(June 2004_ October 2007)*, 5 November http://www2.irb-cisrc.gc.ca/en/research/rir/index_e.htm?action=record.vicrec&gotorec=451553- Accessed 13 October 2008.
45. Despite Chinese dominance of the business sector, there is substantial evidence to suggest a degree of discrimination against ethnic Chinese in Malaysia. Reports indicate that there are laws in place which institutionalize some forms of discrimination against ethnic Chinese and other minorities in order to preference ethnic Malays (bumiputras). This includes in education, in government and private sector employment, and in obtaining business permits and licenses. The 2008 US State Department report on human rights in Malaysia outlines some of the preferential

programs: the Law and government policy for extensive preferential programs designed to boost the economic position of bumiputras. Such programs limit opportunities for non-bumiputras in higher education, government employment, business permits and licenses, and ownership of land. Businesses are subject to race-based requirements that limit employment and other economic opportunities for nonbumiputra citizens. According to the government, these programs are necessary to ensure ethnic harmony and political stability. (*US Department of State 2009, Human Rights report for 2008-Malaysia*, February, Section 5).

46. In respect generally of the freedom of religion, the US Department of State relevantly noted that:

“The constitution provides for freedom of religion; however, the constitution and the government placed some restrictions on this right. The constitution defines all ethnic Malays as Muslims and stipulates that Islam is the official religion. The government significantly restricted the practice of Islamic beliefs other than Sunni Islam. Article 11 of the constitution states, "Every person has the right to profess and practice his religion," but it also gives state and federal governments the power to "control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam." Civil courts continued to cede authority to Shari'a courts on cases concerning conversion from Islam and certain areas of family law involving disputes between Muslims and non-Muslims. Shari'a courts ordered some Muslims attempting to convert to other religions to undergo mandatory religious reeducation classes. Non-Muslims, who constitute approximately 40 percent of the population and include large Buddhist, Christian, Hindu, and Sikh communities, were free to practice their religious beliefs with few restrictions. According to the government, it allocated RM428 million (approximately \$125.9 million) to build Islamic places of worship and RM8.1 million (\$2.4 million) to build Christian, Buddhist, Hindu, and other minority religions' places of worship between 2005 and the end of the year. The Registrar of Societies, under the Home Ministry, registers religious organizations. Registration enables organizations to receive government grants and other benefits. The government did not recognize some religious groups; as such these groups sometimes registered themselves as businesses under the Companies Act.... .The government generally respected non-Muslims' right of worship; however, state governments have authority over the building of non-Muslim places of worship and the allocation of land for non-Muslim cemeteries. State authorities sometimes granted approvals for building permits very slowly. Minority religious groups reported that state governments sometimes blocked construction using restrictive zoning and construction codes. In practice Shari'a law as interpreted in the country does not permit Muslims, born into Islam, to convert to another religion. Shari'a courts routinely denied requests to convert from Islam. Lina Joy reportedly left the country rather than pursue her conversion case in a Shari'a court, following the 2007 decision by the Federal Court to uphold a 2005 lower court decision that the civil courts did not have jurisdiction. The law strictly prohibits non-Muslims from proselytizing Muslims; proselytizing of non-Muslims faced no legal obstacles. According to the Malaysian Consultative Council of Buddhists, Christians, Hindus, Sikhs, and Taoists, the government continued to restrict visas for foreign clergy under the age of 40 to inhibit "militant clergy" from entering the country. While representatives of non-Muslim groups did not sit on the immigration committee that approved visa requests for clergy, the committee asked the consultative council for its recommendations. In May

the Hindu Endowment Board claimed the government refused to approve permit extensions and rejected new applications for priests and temple musicians, requiring existing visa holders to apply for extensions on a monthly basis. In December the human resource minister said Indians should stop relying on foreign priests and that the government was prepared to arrange the training of ethnic Indian youths to become temple priests.... ..Some religious minorities have complained that the government undermined their rights in deference to the status of Islam. On July 4, a Sikh group representing more than 100,000 Sikhs joined the Catholic archbishop's lawsuit against the Internal Security Ministry's February 12 directive to the Catholic Church to stop using the word "Allah", which the ministry considered exclusive to Islam, in its weekly publication, The Catholic Herald. The case remained pending at year's end. On July 16, the Home Ministry issued a letter to the Catholic archbishop, as publisher of The Catholic Herald, demanding an explanation for allegedly publishing material that breached the publishing permit by analyzing the August by-elections. In August the ministry issued a warning letter to Herald, demanding an explanation for articles that allegedly did not "focus" exclusively on religion and a report that allegedly degraded Islam, entitled America and Jihad-where do they stand? In December the government renewed the printing permit but prohibited the paper's publication in Malay, the country's official language”.

FINDINGS AND REASONS

47. The applicant entered Australia on an apparently valid and legally issued Malaysian passport, a certified copy of the passport is on the Department file. The passports indicate that the applicant was born in and is a citizen of Malaysia, and on this basis the Tribunal finds that he is in fact a citizen of Malaysia and has assessed his claims on this basis.
48. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is “well founded” or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision –making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as necessary to enable the examiner to establish the relevant facts. A decision maker is not required to make the applicant’s case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v GUO & Anor* (1997) 191 CLR 559 @ 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)
49. Under s. 91R(1)(b) of the Act, persecution must involve serious harm to the person.

CONCLUSIONS

50. The discrimination experienced by the visa applicant on the ground of his Chinese ethnicity, does not amount to serious harm. The applicant complained that he did not get a free scholarship to a Malaysian University, was unable to get work in Government he claimed that his business failed because of discrimination by the Malaysian Government against Chinese, and claimed he was denied the opportunity to earn a living and to be treated equally in employment and business. The Tribunal finds that the applicant did not attend University in Malaysia, but does not accept that the

applicant suffered financial hardship as a result. The applicant told the Tribunal that he commenced work in the logging business in 1984 and earned considerably more income in the logging business, than he would have as a student and part time teacher. The Tribunal finds that the applicant had his own logging business in Sarawak from which he made a good income. Although he was required to take on a Malaysian business partner this did not cause his business to fail the applicant told the Tribunal that as the forests were progressively being cleared in Malaysia it became more difficult to carry on business and he sold out to his Malaysian partner for \$60,000. The Tribunal finds that after his time in the logging business the applicant became involved in the fishing industry. While he complained he could not hold a fishing permit in his own name he was able to get around that requirement by renting a permit from a Malay he was not deprived of a living and sold out of that business in a Malaysia in 2004. He was still able to work part time and have sufficient savings to allow him and his defacto to travel to Australia and holiday for 5 months before looking for work. The Tribunal accepts the applicant's claim that he is unable to get work in Government which is supported by country information available to the Tribunal. However, the Tribunal finds the applicant has not suffered serious harm for a Convention reason, as an ethnic Chinese living and working in Malaysia because he was able to obtain work and carry on his own business. The Tribunal relies upon the country information referred to above and does not accept that there has been a material or substantial change in circumstances in Malaysia, while the applicant has been in Australia that points to a change in his present status such as to establish a well founded fear of persecution should he return to Malaysia.

51. The applicant is a Christian, and attended a Methodist church in Sarawak. He complained that churches were difficult to find in Malaysia, and Christians often had to travel a long way to get to Church. He did not suggest that he was denied any education work or freedom because of his religion. He was able to attend a Chinese School in Malaysia but did not learn Chinese as only English and Malay were taught in his school. When the Tribunal pointed out that he had not made any claim of discrimination on the basis of his religion, he referred to discrimination in the sense that he could not obtain a scholarship to University, however his daughters attend University and his defacto's son attended University in Malaysia which enabled him to get a good job in Singapore. The Tribunal invited the applicant to provide any additional material referring to discrimination against Chinese people in Malaysia after the hearing to date he has not provided any additional information in support of his claims. The Tribunal finds that the visa applicant has not suffered harm in the past for his religious beliefs and accepts the information contained in the US Department of State report that the Constitution permits freedom of religion and the Tribunal finds that the visa applicant does not face a real chance of persecution in the reasonably foreseeable future because of his religion.
52. The Tribunal finds that the applicant relying on competent professional advice did not apply for a Protection visa when he first decided to extend his stay in Australia. The Tribunal finds that neither the applicant nor his advisors felt that he had a legitimate claim for a protection visa, instead they decided to apply for a subclass 457 visa. The Tribunal finds that the visa applicant's delay in lodging a protection visa is consistent with the applicant not possessing a genuine fear of persecution on his return to Malaysia.

53. 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

54. 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. RCHADW