

0902229 [2009] RRTA 346 (5 May 2009)

DECISION RECORD

RRT CASE NUMBER: 0902229

DIAC REFERENCE(S): CLF2009/25391

COUNTRY OF REFERENCE: New Zealand

TRIBUNAL MEMBER: Andrew Jacovides

DATE: 5 May 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 New Zealand, arrived in Australia [in] September 1997 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] March 2009. The delegate decided to refuse to grant the visa [in] March 2009 and notified the applicant of the decision and his review rights by fax dated [in] March 2009.
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] March 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 file CLF2009/25391, with the protection visa application and the delegate's decision, and the Refugee Review Tribunal (RRT) file 0902229, with the review application.

20. The applicant appeared before the Tribunal [in] April 2009 to give evidence and present arguments.

21. The applicant was represented in relation to the review by a registered migration agent.

Department file CLF2009/25391

22. The applicant stated in his protection visa application that he was born in Samoa [in] March 1983. He stated that he was unsure of his citizenship at birth but he speculated that he may have been a citizen of Samoa. He stated that his family subsequently moved to New Zealand where he acquired New Zealand citizenship. He stated that he migrated to Australia with his family [in] September 1997.

23. The applicant stated that between 2005 and 2007 he was in prison for offences relating to breaking and entering. He indicated that following his release he was placed in Villawood Detention Centre.

24. The applicant claimed that he had no family in New Zealand and if he returns there he will be in danger from "New Zealand gangs". He stated that if the gangs found out that he was in jail in Australia, and that he had been deported from here, he would be at risk being "recruited or alternatively, attacked by these gangs". He stated that he would be particularly vulnerable to targeting by gangs because he has no family in New Zealand to protect him. The applicant stated that the gangs in New Zealand are out of control and have a lot of power. He stated that the authorities cannot control the gangs and they will not be able to protect him if he is targeted.

25. The applicant was interviewed by the delegate [in] March 2009. The Tribunal has listened to the recording of the interview. He essentially repeated his claims.

26. The delegate found that citizens of New Zealand have access to a reasonable level of protection provided by the State and if the applicant is targeted by the gangs in New Zealand he will have access to protection by the State.

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27. The Tribunal received a submission from the applicant's advisor [in] April 2009. He stated that the applicant fears harm from Tongan, Kiwi, and other ethnically based gangs in New Zealand, because he does not have family there to protect him. He argued that information from external sources demonstrates that there is a real or substantial basis for the applicant's

fear and he referred to three articles which reported on gang activity in New Zealand. The adviser argued that the applicant will be seriously harmed by criminal and ethnic gangs in New Zealand and he will suffer this harm because of his membership of a particular social group, that group being 'people who do not have any family in New Zealand'. He argued that the authorities in New Zealand are incapable of providing effective protection to individuals targeted by the gangs. The adviser went on to state that consideration should also be given to allowing the applicant to remain in Australia on compassionate grounds.

The hearing

28. The applicant attended the hearing without his adviser. He essentially repeated his claims. He stated that he will be forced to join a gang in New Zealand to avoid physical abuse from other gangs. He stated that the police will not protect him because he will be considered a "troublemaker" due to his criminal record.
29. The Tribunal referred to information from external sources relevant to the applicant's claims. The Tribunal referred to an article in Time magazine which provides an overview of gang activity in New Zealand (Time 2007, *Tribal Trouble*, 5 July at <http://www.time.com/time/magazine/article/0,9171,1640583,00.html>) The Tribunal commented that this report suggests that joining a gang is difficult and that potential members have to perform difficult and sometimes dangerous tasks before they are permitted to join. The Tribunal further commented that the gangs appear to operate mostly in south Auckland and often involve teenagers. The Tribunal commented that in these circumstances it seems unlikely that he will be targeted by the gangs or forced to join one. He stated that as a young Samoan man, without family in New Zealand, he will face ongoing physical abuse from ethnic gangs which target persons such as him, that is young Samoan men without family
30. The applicant stated he will have no one to support him and he will be forced to join a gang to obtain protection. The Tribunal referred to the US Department of State's most recent report relating to human rights conditions in New Zealand (US Department of State 2009, *Country Report on Human Rights Practices 2008*, New Zealand, 25 February). The Tribunal commented that citizens of New Zealand enjoy a high standard of human rights and have access to reasonable level of protection provided by the State. The Tribunal commented that the information in the report indicates that if he is targeted by a gang or gangs in New Zealand he will have access to a reasonable level of protection provided by the State.
31. The applicant stated that the police will not assist him because he will be considered a troublemaker. He stated that it would be safer for him to join a gang rather than rely on the authorities to protect him.
32. The applicant stated that he made mistakes when he was younger, which led to the difficulties he now faces, but he was confident that with the support of his family he can avoid further difficulties with the authorities in Australia. He stated that he wants to be a law abiding person but he is fearful that in New Zealand, without his family, he may not be permitted to lead a lawful and trouble-free life.

FINDINGS AND REASONS

33. The applicant claims to be a citizen of New Zealand and the Tribunal accepts this claim.

34. The applicant claims that he is at risk of harm by criminal and ethnically based gangs in New Zealand and he is fearful that he will either be forced to join a gang or he will be targeted by them. He claims that as a young male Samoan, without family and with a criminal record, he will be particularly vulnerable to targeting by the gangs. The applicant claims that he is at risk of harm for reasons of his membership of a particular social group, that group being 'people who do not have any family in New Zealand'. He claims that without the protection, support, and assistance, of his family he may be forced to join a gang for protection. He further claims that the police in New Zealand will not be able or willing to protect him. He claims that because of his background he will be considered a trouble-maker and he will be denied full access to the protection which would otherwise be available to citizens of New Zealand.
35. The Tribunal has considered whether 'people who do not have family in New Zealand' constitute a particular social group for Convention purposes and whether members of the group are at risk of serious harm by criminal or ethnically based gangs in New Zealand. On the available information, the Tribunal is not satisfied that people without family in New Zealand are at risk being subjected to persecution by gangs in New Zealand for reasons of their membership of that particular social group.
36. Nevertheless, the Tribunal accepts that the applicant as a young Samoan man without family in New Zealand, who has spent time in prison, may be vulnerable to targeting by the gangs, particularly if he resides in an area such as south Auckland where the gangs are active. The Tribunal accepts that in part the targeting may be motivated by the applicant's race and background. However, the Tribunal finds that even if the applicant is targeted by the gangs, in any of the ways he anticipates, he will have access to a reasonable level of protection provided by the State in New Zealand.
37. The applicant claims that the police will not protect him. He claims he will be considered a trouble maker by the police and he will not be provided with the protection which would otherwise be commonly available to the citizens of New Zealand. In response to this claim, the Tribunal has considered information from external sources referred to above, relating to human rights conditions in New Zealand, and it finds that all citizens of New Zealand have access to reasonable level of protection provided by the State irrespective of their background. The Tribunal finds that the applicant's claim that he will be denied the full benefit of protection by the State, which is commonly available to New Zealand citizens, is not well-founded.
38. The Tribunal considered the applicant's associated claim that the gangs in New Zealand are powerful and the authorities cannot control their activities. The Tribunal accepts that the authorities have not been able to eliminate the gangs or prevent their criminal activities. However, as observed in *MIMA v Respondents S152/2003* by Gleeson CJ, Hayne and Heydon JJ, "no country can guarantee that its citizens will at all times and in all circumstances, be safe from violence": (2004) 205 ALR 487 at [26]. Justice Kirby similarly stated that the Convention does not require or imply the elimination by the State of all risks of harm; rather it "posits a reasonable level of protection, not a perfect one": *ibid* at [117]. The majority judgement suggests that an appropriate standard of protection requires the State to provide its citizens with suitable criminal law and the provision of a reasonably effective and impartial police force with a justice system which is consistent with international standards. The Tribunal is satisfied that the State in New Zealand provides such a standard of protection for its citizens and it finds that if the applicant requires protection from the gangs in New

Zealand he will have access to protection by the State which will be consistent with international standards.

39. The applicant's adviser has asked that consideration be given to allowing the applicant to remain in Australia on compassionate grounds. The applicant has argued that he will face considerable hardship if he is forced to return to New Zealand without his family. However, the Tribunal's role is limited to determining whether the applicant satisfies the criteria for the grant of a protection visa. A consideration of his circumstances on other grounds is a matter solely within the Minister's discretion.
40. Accordingly, and in view of the above findings, the Tribunal is not satisfied that the applicant faces a real chance of serious harm in New Zealand, by gangs or the authorities, such that it gives rise to a well-founded fear of persecution for reasons of membership of a particular social group or any other Convention ground.

CONCLUSIONS

41. 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

42. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

<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>. Sealing Officer's I.D. RCHADW</p>
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