

1001087 [2010] RRTA 288 (7 April 2010)

DECISION RECORD

RRT CASE NUMBER:	1001087
DIAC REFERENCE(S):	CLF2009/155482
COUNTRY OF REFERENCE:	Papua New Guinea
TRIBUNAL MEMBER:	Andrew Mullin
DATE:	7 April 2010
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 Papua New Guinea, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the Applicant of the decision and his review rights by letter dated the same day.
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 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 Departmental and Tribunal files relating to the Applicant. The Tribunal also has had regard to the material referred to in the delegate's decision.
20. The Applicant appeared before the Tribunal to give evidence and present arguments.

Summary of written claims

21. In his protection visa application the Applicant claims to have been born in village A in Papua New Guinea, in the mid 1960s and to have lived in company mining camps in the period from the mid 1980s to the early 2000s. He claims to have received a total of twelve years of formal education in Papua New Guinea, ending in the 1980s and to have been employed on various mining projects in Papua New Guinea from the late 1980s to the early 2000s. He claims to be divorced and lists a number of children living in Papua New Guinea and one child born in Australia among his family members and close relatives.
22. The Applicant's substantive claims, which are expanded on in an attached letter to the Papua New Guinea High Commission in Australia, may be summarized as follows:
 - He was sponsored to come to Australia by an Australian company and saw it as an opportunity to achieve financial security for his family. His final goal was to move his family to Australia but the company refused to sponsor them. He worked in Australia and remitted money to them. He also returned to see them when he could do so.
 - Because of unsafe working conditions he suffered an injury [details deleted: s.431(2)] in an industrial accident in the mid 2000s and, despite two operations, he lost [its] use. The injury made it difficult for him to work [details deleted: s.431(2)] and he was placed on light duties. His application for a Skills visa was refused because of his disability. His employment was terminated in the late 2000s. He became depressed, began drinking and had suicidal thoughts.
 - His wife threatened to attack him because he had not taken her to Australia. In the mid 2000s he heard from family members that she was having an affair and he returned to Papua New Guinea. He went to his village and found she was planning to kill him. He was attacked by her brothers, from another village, who were under the impression that he wanted to leave her and marry another woman. He received cuts to his hands and head and was hospitalized. His own tribesmen wanted to attack the brothers in revenge but he dissuaded them for fear of starting a tribal war.
 - Some other people were also injured in the attack and the vehicle in which he was travelling was destroyed. He has to compensate the owners.

- He will not be safe in his village. His wife has organized a criminal gang there who have already threatened his life. During his last visit to Port Moresby in the late 2000s he was told by a friend that his wife was there, with the criminal gang, and was organizing an attack on him. He paid some people to look after him. He did not stay long and had no freedom of travel.
- Because those who wish to harm him are tribal people the payback system is a continuing problem. There is no proper legal system and no police protection for an ordinary person like him. There is nowhere in Papua New Guinea where he can find safety.

23. Documents attached to the application include, relevantly, letters relating to the Applicant's employment in Australia and a report from a [doctor] confirming the loss of [details deleted: s.431(2)] as a result of work injury in the mid 2000s.

Departmental interview

24. I have reviewed the audio recording of a Departmental interview attended by the Applicant. In it he added to his written claims by claiming, relevantly, that:

- He had tried to explain to his wife's brothers that the failure to bring his family to Australia was due to the position taken by his company. However they are uneducated and would not listen.
- Asked about his return visits to Papua New Guinea after the time of the attack he said he went only to Port Moresby. He was safe there for some time but on his last visit he found that his wife was in Port Moresby organizing a criminal gang to attack him.
- He was sending money fortnightly to Papua New Guinea to help support his children. Asked why his wife would wish to jeopardize these payments by having him killed he repeated that his wife's brothers believed that he had married someone else in Australia. Asked what she would do for income if he were killed he said he never sent money to her. Asked who would pay for the children if he were killed he said the children were with his relatives.
- It was put to him that the threat of harm to him was a private criminal matter. He said this was not so, and that it was the fault of his company and the Department that his family was not permitted to come to Australia.
- Asked what he feared would happen to him if he returned to Port Moresby he said he was in danger of being killed there by the criminal gang organized by his wife. He had been told of this threat during his last visit by friends in Port Moresby. He had to stay 'locked up' in a hotel and then return to Australia. He had gone to Papua New Guinea to see his children who are being cared for by his cousin.
- Asked if he could relocate to a different area such as Port Moresby he said ordinary people are not protected by police. People are killed in the street and he knew there was already a price on his head.

Further submission

25. The Tribunal received a submission from the Applicant in which he claims that:
- His life has been repeatedly threatened. Those threatening him are from a different tribe. He has to travel through their village to reach his own village and they will not let him pass. They are intent on killing him and have already organised a criminal gang to do so if they find him. They attacked him with machetes in the mid 2000s and he required hospitalisation for his injuries.
 - Some of his fellow tribesmen were injured in this incident and the vehicle in which he was travelling was seriously damaged. The tribesmen who own it (who are members of a different tribe from his tribe) have threatened him to obtain compensation for it.
 - His own tribe has taken his land in compensation for his injuries. There are no male members of his tribe remaining, following the death of his father three years ago, and there was nobody to stand up for him.
 - He has nowhere to go and no land. Three tribes either want him dead or want compensation from him for the damage caused in the mid 2000s incident.
 - In his subsequent visits to Papua New Guinea he could only visit friends in Port Moresby. He cannot travel anywhere else and even in Port Moresby he is not very safe. He can stay in only one place and has to be careful when he goes out. When he last visited Port Moresby only a relative knew where he was. He remained locked in a hotel room and had to return to Australia as soon as he could. His relative died in the last few months and there is now nobody in Papua New Guinea that he can trust or feel safe with.
26. The Tribunal received a further submission from the Applicant to which were attached:
- A medical certificate confirming the Applicant's loss of [details deleted: s.431(2)] and his need for six-monthly consultations about [this].
 - A letter on the letterhead of the Royal Papua New Guinea Constabulary. The writer, a high level police officer stationed in Port Moresby, states that he knows the Applicant since he comes from the same District. He confirms the Applicant's claim to have been injured in the mid 2000s when he was attacked by his estranged wife and her relatives as he was travelling in an area near his home village. While on patrol in the late 2000s in an area of Port Moresby he met the Applicant and received a verbal complaint from him to the effect that his ex-wife had tried to kill him on several occasions. He advised the Applicant to lodge a formal complain but he did not do so. He later learned that the Applicant had left for Australia in the late 2000s because of further threats. He believes the perpetrators have shown, through the attack on the Applicant in the mid 2000s that they are capable of carrying out their threats.

Claims at hearing

27. The Applicant said he had prepared his protection visa application with the help of a community leader. He subsequently retained the services of a migration agent who helped him with his submission. He was aware of all the claims put to the Department and the Tribunal in writing and they were all true. The information he had provided in his

Departmental hearing was also true, although he had been unable to articulate some of his claims, in part because he had been stressed.

28. Regarding his fear of persecution in Papua New Guinea the Applicant said he was afraid that he would be killed if he returned. This was because he was targeted by three separate groups of people:
- His former wife and her relatives are from village B and are members of tribe C. His former wife, who is now living in Port Moresby, blamed him for his failure to bring her and their children to Australia when he obtained a contract to work here in the mid 2000s. He learned a few years later that she was having an affair and later divorced her. She blamed him for this and for the loss of the remittances he had been sending her. She and her relatives accused him of having married another person in Australia. They were responsible for the attack on him near village B in the mid 2000s and they had engaged a criminal gang in Port Moresby to find him and kill him.
 - Members of Tribe D lived near his village, Village A. It was this group which had owned the vehicle in which the Applicant and four of his fellow tribesmen were travelling when attacked by his former wife's relatives in the mid 2000s. The vehicle was badly damaged in the incident and compensation was demanded of the Applicant. Asked why he could not settle the matter simply by paying the required compensation he said he had spent his money on medical treatment after the attack. They were demanding a very large amount – and he was unable to pay.
 - Members of his own tribe, tribe E, were demanding compensation for the injuries sustained by four of their members who were injured in the mid 2000s attack. They regarded this as the Applicant's own business. They had already appropriated his land in village A, a move which was made easier by the fact that his father had died and he had no brothers to stand up for him. They were demanding further compensation which, once more, he was unable to pay.
29. The Applicant said he did not fear harm for any other reason in Papua New Guinea.
30. The Applicant explained in some detail the mid 2000s attack, the threat from a criminal gang in Port Moresby and the reasons why he feared harm from the three groups he had identified. He said there was nowhere he could go in Papua New Guinea where he would be safe.
31. Asked about the availability of police protection the Applicant said he had lodged a complaint at a police station following the mid 2000s attack but this had not produced any action. He had mentioned to a police officer the problems he was experiencing in Port Moresby in the late 2000s but had not proceeded to lodge a formal complaint. He agreed that the police could not be expected to take any action to protect him in the absence of such a complaint. He said he had feared for his life and could not afford to wait around in Port Moresby. Asked if he had ever complained about the appropriation of his land or the demands for compensation he said the police did not care and could not protect him. There was a great deal of lawlessness and corruption in Papua New Guinea. He had nobody in his family who could stand up for him.

32. I put to the Applicant that there exists in population centres such as Port Moresby a network of social relationships which would allow him to seek support from his 'wantoks' (people from his own tribe or area). I noted that he appeared to have at least one such supporter in the police force and that these people would be able to offer him a degree of protection. He agreed that such social mechanisms exist but argued that he could not rely on them to protect him all the time. He would be afraid to appear in public or walk openly in the streets with his children
33. I put to the Applicant that there could be room for doubt that the harm he feared in Papua New Guinea had a connection with a Convention ground since the three groups involved appeared to wish to harm him for purely personal reasons having to do with the breakdown of his marriage and the incidents which flowed from it. He suggested that a Convention nexus might be found in the fact of his membership of a particular social group consisting of his tribe. I explained that, while he might well be a member of this particular social group, it was necessary for the feared harm to occur because of that membership; in his case it seemed doubtful that any such connection existed. Invited to comment on this he repeated that he faced death if he returned to Papua New Guinea and that he had nowhere to live there. He suggested that he would end his life if he were unsuccessful in his efforts to find protection in Australia.

FINDINGS AND REASONS

34. On the basis of his passport which he submitted at the hearing I accept that the Applicant is a citizen of Papua New Guinea, as he claims to be.
35. The Applicant claims to fear that he will be killed by three separate tribal groups if he returns to Papua New Guinea.
36. In the present case the Applicant proved to be a generally reliable witness at the hearing. His evidence was mostly consistent and detailed and I am satisfied, overall, as to the credibility of his claimed fear of harm in Papua New Guinea. I also accept as credible the evidence of the police officer who provided a written statement in support of his claims. An internet search has not produced any references to the three tribes mentioned by him at the hearing but I have given him the benefit of the doubt by accepting that they do exist and that their names may be spelled differently from the versions he offered. There is some degree of speculation in his claim that members of all three tribes would still wish to harm him if he were to return to Papua New Guinea now, and the likelihood that they would have the capacity or will to do so does not appear to be very large. I accept however that this is more than a remote possibility and, on this basis, I am satisfied there is a real chance that he would suffer serious harm in Papua New Guinea.
37. As put to the Applicant at the hearing, the difficulty for his case is that the harm which he fears in Papua New Guinea flows from purely personal circumstances having to do with the breakdown of his marriage, the enmity of his former wife and her tribal relatives, and the consequences of the incident in the mid 2000s when they attacked him and a group of his fellow tribesmen. I am not satisfied that these factors engage any of the five Convention grounds and I am not satisfied that he would suffer Convention-based harm as a result.
38. In this context I have considered the Applicant's claim that a nexus to a Convention ground lies in his membership of a particular social group consisting of tribe E. As put to him at the hearing, I accept that such a particular social group can clearly be said to exist and that he is a

member of it. Although he suggested at one point in the hearing that there was a background of tribal conflict between tribes D and E, and that some conflict had erupted between them as a result of the mid 2000s incident, there is nothing in the information before the Tribunal to indicate that such conflict has continued or that any harm the Applicant might suffer if he returned to Papua New Guinea would be for this reason. As noted above, the harm he claims to fear stems from his own personal circumstances and I am not satisfied that it is for reason of this membership of the tribe E particular social group. Nor am I satisfied, on the information before the Tribunal, that there is any other particular social group to which he can plausibly be said to belong, which membership would be a reason for the harm he fears.

39. I have also considered whether the Applicant would be denied protection by the Papua New Guinea authorities for a Convention reason. I note that the Applicant claims to have lodged a complaint about the mid 2000s attack on him but that this produced no results. His evidence at the hearing was that he had not gone to the police about the loss of his land or the demands for compensation over the damage to the vehicle in the mid 2000s because the Papua New Guinea police did not care, and because of the problems of lawlessness and corruption. I also note that he did not make a formal complaint when he learned of the threat to his life in Port Moresby in the late 2000s, although he mentioned his problems to a friend in the police force whom he chanced to meet. While I accept that he may have had little confidence in the ability of the police to protect him he thus provided no opportunity since the mid 2000s for them to do so. Further, there is nothing in the Applicant's evidence to suggest that, within the limits of their resources and capabilities, the police would deny him protection for a Convention-related reason or that they would discriminate against him in any way.

Summary

40. In the light of all the information before the Tribunal I accept there is a small though real chance that the Applicant would suffer serious harm at the hands of three separate tribal groupings if he were to return to his village, village A. I also accept that, as he has been threatened in Port Moresby, he would be unable to find safety by relocating there. Given the tribalised nature of Papua New Guinea's society I accept that he could not reasonably avoid harm by relocating to other smaller towns or villages, even if he had groups of fellow tribesmen living there. However, I am not satisfied that in the event he did suffer harm this would be motivated by any of the Convention reasons. Nor am I satisfied that he would be denied the protection of the state for a Convention reason.
41. I am not satisfied that the Applicant has a well-founded fear of persecution for a Convention reason should he return to Papua New Guinea now or in the reasonably foreseeable future and I am not satisfied that he is a refugee.

Humanitarian issues

42. As noted, I accept there is some risk that the Applicant would face serious harm if he returned to Papua New Guinea and that this harm cannot reasonably be avoided by relocating. I also accept that he has lost [details deleted: s.431(2)] as a result of an industrial accident he suffered in Australia and which, he claims, was a result of unsafe work practices by his employer. He claims his employment prospects have been damaged as a result of this accident and that he is in financial distress although he expressed some confidence at the hearing that, if his immigration status allowed him to do so, he could once more find work in the mining sector. Having considered the ministerial guidelines relating to the Minister's discretionary power under s.417, set out in PAM3 'Minister's guidelines on ministerial

powers (s345, s351, s391, s417, s454 and s501J)' I consider this case should be referred to the Department to be brought to the Minister's attention.

CONCLUSIONS

43. 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

44. 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>. MLOZIN/prt44</p>
