

0800412 [2008] RRTA 209 (15 April 2008)

DECISION RECORD

RRT CASE NUMBER: 0800412

DIAC REFERENCE(S): CLF2007/190974

COUNTRY OF REFERENCE: Korea, Republic Of

TRIBUNAL MEMBER: Ricky Johnston

DATE DECISION SIGNED: 15 April 2008

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 Korea, most recently arrived in Australia and applied to the Department of Immigration and Citizenship (the Department) for a Protection (Class XA) visa.
3. The delegate decided to refuse to grant the visa and notified the applicant of the decision and her review rights by letter. 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 Parts 785 and 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, which includes the protection visa application and the delegate's decision record. 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 Department file

20. The following claim and information is contained on the Department's file:
 - The applicant was born in South Korea and lived at the same address for a number of years.
 - She speaks, reads and writes Korean and describes her religion as Christian
 - She received a number of years' education in Korea, qualifying in a Certificate/ Diploma
 - She worked in a number of positions All of her employment took place in South Korea.
 - The applicant travelled to Australia on a Korean passport to visit.
 - The applicant departed Korea legally and did not have any difficulties obtaining a passport. At the time of her application, her family remained in Korea.
 - The applicant's child was born in Australia. It is claimed the child was born with a disability. The application form submitted on behalf of the applicant's child states the child is an Australian citizen.
21. The applicant's reasons and background for claiming to be a refugee are as follows:
 - a. She came to Australia to visit her partner. After arriving in Australia she became pregnant. She could not return to Korea as her doctor was concerned about her health. She has applied for a Medical Treatment visa, but this application has as yet not been decided. At the time of making that visa application she was an unlawful non –citizen. She claims this occurred as no fault of hers as she believed her then partner had already applied for a partner visa on her behalf.

- b. She separated from her partner as he subjected her to abuse and because she found out, that contrary to what he told her, he was not divorced from his previous wife.
- c. Her father in Korea has requested her to abandon her baby and return to him in Korea, but she cannot do this. Her family will not support her or her child if she returns to Korea.
- d. She also fears her ex - partner, may not allow her to take her child with her to Korea. If however she did return to Korea with her child, the child will not be able to see the father again.
- e. She and her child will face substantial discrimination and be mistreated by the general public and her family if she returns to Korea.
- f. Her child would be discriminated against for their entire life and because of their disability will not have the level of health care they are entitled to in Australia.
- g. She has a qualification but would not be able to work in this area as parents would not allow their children to associate with her.
- h. The situation in Korea for single mothers and their children is still bad. She acknowledged that while matters have improved recently she believes discrimination is a cultural matter that has existed for a long time. There is no social security for single mothers and the Korean government cannot protect her from substantial financial hardship.

The Tribunal file

- 22. The applicant was assisted in preparing her review application
- 23. Departmental movement records show the applicant having been granted tourist visas on which she entered and departed Australia. She currently holds a bridging visa.
- 24. The Tribunal invited the applicant to attend a Tribunal hearing.
- 25. The Tribunal received a statutory declaration completed by the applicant. The statutory declaration is mainly concerned with the applicant's claim of being a victim of domestic violence. It sets out how the applicant met her partner; resided with him whenever she visited Australia. A wedding date was eventually set but this did not take place due to the partner's business downturn. She was pressured into transferring monies to him. She became pregnant She became an unlawful non-citizen but was not aware of this as she believed her ex –partner had been to the Department to have her visa extended. She was abused by him and eventually left him. The applicant restated her claims that in Korea she and her child will suffer as there is a very severe social perception about unmarried mothers. Her child will be the ultimate victim of that social perception. Her family will not help her or her child should they return to Korea. Her parents wish her to launch an investigation in Korea regarding her ex-partner's marriage fraud.

The Tribunal hearing

26. The applicant appeared before the Tribunal to give evidence and present arguments. This is summarised as follows.

The Tribunal asked the applicant whether she had any further information/ documents she wished to submit to the Tribunal. She indicated no, stating she believes the information in the visa application and her statutory declaration to be truthful.

The applicant referred to her university and employment history in Korea.. She stated she lived with her father until she graduated from university and thereafter with her mother until she came to Australia. She has contact with her mother and siblings in Korea. Her parents are divorced.

[Details of the relationship with her ex-partner deleted in accordance with s431 as it may identify the applicant]. The applicant indicated she is concerned that if she is forced to return to Korea her ex - partner will attempt to prevent her child from returning with her.

The Tribunal noted that the applicant's mother had visited her and her child in Australia while she was still living together with her ex - partner. The Tribunal asked the applicant about her mother's reaction to the child. The applicant said she thinks her mother does not want her to come to Korea with the child as she might be embarrassed at what neighbours think about the situation. The applicant added this might be because of her mother's own experience bringing up children when she was separated and divorced from her husband, the applicant's father. The applicant further stated that she herself has experienced the shame of what it is like to be a child of a divorced couple and because of this being badly treated by Korean society. She stated she considers such treatment to be worse still if one is born out of wedlock.

The applicant indicated she last had contact with her father a number of years ago and that she lived with her mother until coming to Australia. The Tribunal noted that in her written statements the applicant claimed that her father had asked she abandon her child and return to Korea without the child. When the Tribunal put this to the applicant she stated that her brother had told her that her father is supposed to have said this.

The applicant stated she cannot live without her child. She stated she firmly believes that if she returns to Korea with her child the child will suffer, given the social perception about children born out of wedlock and that the child would not be able to access health care in Korea as readily as in Australia. She told the Tribunal she believes she herself will be discriminated against by her family and society in general, that she will have difficulties finding employment to support herself and her child and that she will receive no support from her family.

The Tribunal discussed social welfare issues with the applicant, noting it appears that single mothers in Korea are able to apply for low income support; that her child, although of a single parent, would have access to medical services and that there is no formal discrimination against single mothers in accessing public housing and employment. The applicant responded that while she acknowledges that over the years the Korean government may have somewhat changed its position on these issues and on single mothers, it is very different from Australian standards and discrimination does continue. She further indicated she has not heard of single

mothers in Korea having access to government assistance such as low income benefits and other social welfare

The Tribunal questioned whether the applicant would suffer treatment amounting to persecution. The Tribunal also discussed with the applicant whether what she and her child face in Korea would amount to persecution. The applicant replied that in Korea the culture and the concept of the single mother have changed little over the years. There was a very poor image of single mothers. She does not believe there is protection for single mothers; rather she and her child will be ostracised. She said that it would be very difficult for her to get a job if she went back to Korea. The applicant indicated she has a qualification to teach art to children. However she believes she would not be able to find work in this field because of negative client opinion.

The Tribunal also discussed with the applicant information which suggested that children of single parents did not face official discrimination with regard to matters such as health, education, housing and employment. The applicant indicated that in reality Korean society discriminates against children of single parents. Children could be the target of bullying. She is scared for her child's future in Korea. She believes her child will not be accepted by Korean society in general.

27. Following the hearing the applicant provided documentation regarding her family circumstances.

INDEPENDENT COUNTRY INFORMATION

28. *Position of Single Mothers/Discrimination*

Sources consulted indicate that South Korea has experienced considerable social change in recent years. One of the biggest changes for women, and in particular single mothers, in recent years has been the removal of the *Hojuje* system. In January 2008, the old system, known as *hojuje*, was replaced by a new individual identification, and family registration, system, and sources suggest that this has provided more rights to women throughout South Korea. A 2008 report from the Joins.com media website noted:

Under the individual identification system, each family member has the right to his or her own registry. This registry lists the names of a person's parents, spouse and children. Children can have either their mother or father's last name. When parents divorce, children can change their last name as well. However, siblings must have the same last name. The individual identification system stipulates different procedures for divorce or remarriage. In these cases, children can change their names through the courts as many times as they like ('The new system recognizes women's rights and non-traditional families' 2008, Joins.com website, 29 January)

The Tribunal accepts that single mothers in South Korea have traditionally faced strong social opposition. A DFAT report commented on the situation of single mothers and separated women in South Korea.

There is no formal government discrimination against single mothers or mixed race children with regard to housing and employment. Korea is a signatory to the human rights convention and is currently enacting human rights legislation. This legislation will allow individuals to take action when they are victims of discriminatory treatment

DFAT advises that, at the personal level, single mothers may face hostility or strong expressions of disapproval from other Koreans. However, its advice also notes that “traditional strong social opposition to single parenthood, divorce and marital separation is declining” (DFAT 2001, Country Information Report No.160/01, *South Korea: Single mothers / social stigmas / citizenship, illegitimate children*, 5 June, CX53332).

Independent information indicates the South Korean government has been making attempts to reduce gender discrimination, and benefits are available to single mothers. No reports consulted by the Tribunal suggest that the government was actively discriminating against single mothers. A 2007 report from the government website Korea.net suggests that the reduction of discrimination is a concern to the government of South Korea:

The Korean government says it hopes to further promote equality between women and men as the U.N. adopted optional protocol to end discrimination against women will take effect here on Jan.18.

Officials at the Ministry of Foreign Affairs and Trade say they expect that the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against women will contribute to further ensuring women’s equal access to, and equal opportunities in, political and public life as well as education, health and employment.The protocol will allow Korean women who feel the discrimination issue has not been properly settled nationally to take the matter to an international committee formed to end discrimination against women (‘U.N. protocol to end discrimination against women to take effect in Korea’ 2007, Korea.net website, 17 January

29. *Current situation in relation to social security/support for single mothers in South Korea*

Available independent information indicates that single mothers in South Korea may have access to a number of different social security schemes. The social security schemes which single mothers may be eligible for, include the National Basic Livelihood Security Scheme, the Lone-Parent Benefits, Unemployment Benefits, and Maternity Care

A report from the Organization for Economic Co-operation and Development provides an analysis of the social security/support benefits available to people in South Korea in 2002. This and other sources, indicate that many of these benefits have been available to single mothers (OECD 2002, ‘Republic Of Korea’ in *Benefits And Wages*, updated 24 June 2004).

30. *Registration*

As noted above the recently introduced family registration laws now allow women to register their family under their own name, providing more rights to women throughout South Korea.

Available country information indicates that the child of an unmarried Korean woman could be registered as a Korean citizen. With recent changes to the Korean family registration law it may be possible that the child of an unmarried Korean woman could be registered as a Korean citizen. Information from the US Department of States’ Country Specific Information on South Korea claims:

An individual is a citizen of the Republic of Korea if his or her name appears on the Korean Family Census Register (US Department of State 2007, ‘Republic of Korea: Country Specific Information’, 23 October).

A travel advisory report on the ESL (English as a Second Language) Teachers Board reflects the US Department of States claims:

In accordance with the revised Nationality Law, children may acquire Korean citizenship even if only one parent is a Korean citizen. However, even if it is difficult to choose citizenships at an early age, the child must choose one before the age of 18. Even if the father does not have Korean citizenship, the child faces no problems in receiving educational and health insurance benefits (Choi, P. (undated), 'International Marriage and Naturalization for foreign nationals in Korea', ESL Teachers Board website

The Ministry of Health & Welfare states that the National Health Insurance System is available to all Korean citizens.

FINDINGS AND REASONS

31. The applicant claims to be a national of South Korea and travelled to Australia on a South Korean passport. For the purposes of the Convention, the Tribunal has therefore assessed her claims against South Korea as her country of nationality.
32. The Tribunal accepts that the applicant has, since arriving in Australia, had a child out of wedlock. The Tribunal also accepts that the applicant is no longer living with, or in regular contact with, the child's father. The Tribunal accepts the applicant may find her situation in Australia in relation to personal matters, health, and custodial arrangements with her ex-partner in regard to their child, and the prospect of returning to South Korea distressing. The Tribunal accepts that the applicant has a genuine subjective fear concerning her circumstances if she were to return to South Korea.
33. The applicant claims that, as a single mother, she would face discrimination and persecution. If people found out that she was a single mother, they would not give her a job. She also claims that her child would face discrimination and other harm as the child of a single parent
34. The Tribunal accepts that there is still a degree of social stigma attached to single mothers in South Korea. It accepts that the applicant may face some hostility or strong expressions of disapproval from other Koreans as a consequence of her status as a single mother. While opposition to single parenthood exists, the Tribunal is nevertheless of the view that such opposition is declining as indicated by DFAT. The country information consulted shows that South Korea has undergone considerable social change in recent years and that this has had an impact on the family domain in particular.
35. At the hearing the applicant stated that all her family in Korea is aware that she has had a child in Australia. She indicated that she herself is a child of divorced parents. Her mother has visited her and the child in Australia after the child's birth and appeared happy to see the child. She claims however that her mother would be embarrassed if she and her child returned to South Korea. She further claims her father, with whom she has had no contact with for several years, appears to disapprove of his daughter having had a child out of wedlock. The applicant is fearful her family will not support her and her child in any aspect. In circumstances where opposition to single parenthood is declining and the applicant herself is a child of divorced parents, the Tribunal does not accept that the applicant and her child, should she take the child with her to South Korea, face such a high level of social ostracism or would be subjected to such a level of abuse by other South Koreans as to amount to persecution.

36. Available country information indicates that single mothers do not face official discrimination with regard to matters such as housing and employment. The Tribunal does not accept that the applicant would be forced by her family to give up her child. Even if the applicant's father is not accepting of her and her child, there is nothing to suggest that he would be in a position to force the applicant to abandon her child against her wishes.
37. The applicant has expressed a fear that, as a single mother, she would be prevented from obtaining employment and that she would continually be faced with discrimination. The Tribunal notes that the applicant when in Korea last worked in an occupation. The Tribunal further notes that this occupation deals in the main with adults. Advice from DFAT indicates that single mothers do not face formal government discrimination with regard to matters such as employment and housing. Country information also indicates that there are mechanisms and legislation in place to enable the applicant to take action should she face discrimination. In circumstances where disapproval of single motherhood is declining, the Tribunal does not accept that the applicant would face such widespread hostility from employers that she would be prevented from obtaining employment. In light of these changing attitudes, the mechanisms in place to address discrimination and the absence of official discrimination against single mothers, the Tribunal does not accept that the applicant would face such discrimination in the area of employment as to amount to persecution.
38. The applicant believes that as a single mother her child may suffer harm while she is at work. While the Tribunal accepts that the applicant might have difficulty balancing the demands of caring for her child with those of paid employment, it finds that these issues would not be a consequence of Convention-related discrimination or harm directed towards her. Independent evidence does not support the applicant's claim that there is a systematic effort by government authorities to make life difficult for single mothers. On the contrary, available information shows that there is no formal government discrimination against single mothers with regard to matters such as housing and employment. The Tribunal does not accept that there is a systematic effort by government to make life difficult for single mothers.
39. The applicant has expressed a concern about her ability to subsist and has suggested that she would not have access to appropriate social welfare. The Tribunal considers that the social safety net in Korea is generally of an insubstantial nature and that the applicant would not face discrimination in this regard due to her status as the single mother. It finds that the absence of benefits is symptomatic of a generally inadequate welfare system rather than indicative of a systematic effort by the government to make life difficult for single mothers as has been suggested. Nevertheless independent country information shows that since 2002 many social security/ support benefits have been available to single mothers.
40. As set out above, the Tribunal accepts that the applicant would face social opposition as a result of her status as a single mother and might encounter instances of hostility and expressions of disapproval as a result. However, even considering the cumulative impact of such treatment, the Tribunal does not consider that this would amount to serious harm. In light of all of the factors set out above, the Tribunal finds that there is no real chance that the applicant would suffer harm amounting to persecution for reason of her membership of a social group of "single mothers" or for any other Convention reason. Her fear of suffering harm amounting to persecution for reason of her status as a single mother is not well-founded. In making its finding in this regard, the Tribunal also takes account of the fact that the applicant's status may cause her child to face a degree of disapproval, hostility and informal discrimination, a matter which is discussed below.

41. The applicant has indicated she will not abandon her child to be left with the child's father, who resides in Australia. On the other hand she is fearful that if she returns to South Korea with her child, the child will suffer discrimination; will be ostracised and will not be able to access health care, The Tribunal accepts that children of single parents face social disapproval and a degree of informal discrimination. They may face hostility or strong expressions of disapproval from other Koreans. It accepts that the applicant's child would confront such treatment if they were to return to South Korea. However, in circumstances where changing social attitudes have led to declining opposition to matters such as single parenthood and divorce, the Tribunal considers that the degree of disapproval facing the children of single mothers, would also be reduced. As set out above, South Korea has experienced sudden changes in all areas of society and this has affected the family domain in particular. On the basis of country information set out above, the Tribunal finds that the applicant's child, being a child of a single parent, would be able to be registered under the applicant's own household and would then have access to Korean citizenship and to full medical, health and educational services. The Tribunal finds the children of a single parent do not face discrimination with regard to matters such as public education, government medical services, housing or employment.
42. The applicant referred to her own experiences as the child of divorced parents and her own mother's embarrassment of this situation. It may be that the applicant's mother and the applicant faced discrimination However, the Tribunal notes that social attitudes are changing While the applicant believes her family will not support her child in South Korea, the Tribunal notes that the applicant's mother displayed a supportive attitude towards the child, assisting with the child's care in Australia. In any case the family's attitude, whilst unfortunate, is a private matter. In all the circumstances, the Tribunal does not accept that the applicant's child would face such a degree of social hostility and disapproval or such a degree of discrimination as to amount to persecution. It finds that there is no real chance that the applicant's child would face persecution in South Korea for reason of their membership of any particular social group related to the child's status as a child of a single parent It considers that the applicant's mother's fears in this regard, expressed on behalf of her child and in support of her own claims for refugee status, are not well-founded.

Humanitarian Considerations

43. In this case, there are factors which might give rise to a consideration of the applicant's case on humanitarian grounds. While the Tribunal is satisfied that the applicant and her child would not face such harm in South Korea as to amount to persecution, it accepts that the applicant is genuinely concerned that she has flouted South Korean social conventions by becoming a single mother and is daunted by the prospect of having to return to South Korea. There is also the fact that her child is an Australian citizen and that she is in current negotiations with her ex- partner, the father of her child, in relation to contact and support. The Tribunal's role is limited to determining whether the applicant satisfies the criteria for the grant of a protection visa. The Tribunal notes here that for present purposes, it is only pursuant to s417 of the Act that a decision can be taken without being bound by the regulations. Under that section it is open to the Minister himself, upon application to him, to take a decision to substitute the Tribunal's decision for one more favourable to the applicant, provided he considers it to be in the public interest to do so. It is open to the applicant to seek the exercise of the Minister's discretion.

CONCLUSIONS

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

DECISION

45. 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. PRDRSC