

071493820 [2007] RRTA 203 (17 September 2007)

DECISION RECORD

RRT CASE NUMBER: 071493820

DIAC REFERENCE(S): CLF2002/3778 and CLF2007/67101

COUNTRY OF REFERENCE: Fiji

TRIBUNAL MEMBER: Bronwyn Forsyth

DATE DECISION SIGNED: 17 September 2007

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**

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).

The applicant, who claims to be a citizen of Fiji, last arrived in Australia in [Year 4] and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa in [Year 7]. The delegate decided to refuse to grant the visa in [Year 7] 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.

The applicant applied to the Tribunal in [Year 7] for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

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 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

Australia is a party to the Refugees Convention and 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:

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

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

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.

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

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

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

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

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

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

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's files relating to the applicant's protection visa application and her previous other visa application. Also before the Tribunal is the Tribunal's file. The Tribunal has also had regard to relevant independent country information from a range of sources.

Visa application

According to the applicant's protection visa application, she is a Fijian national in her mid fifties and she belongs to a Fiji Indian ethnic group. She indicated that she had not completed any education or been employed in the past. The applicant became a widow when her first husband died in the late 1990s, and she has a number of children from that marriage. A stated number of her children live in India and the remainder live in Australia. The applicant remarried and became a widow for the second time in

[Year 4]. The applicant stated that from the early 1950s to [Year 2] she lived in [Town A] in Fiji.

The applicant claimed that she left Fiji for a number of reasons including political unrest. She claimed that she constantly felt unsafe in Fiji being a widow of her age without the support of her family. She claimed there was increasing poverty and that she experienced racial harassment from the Fijian community. The applicant said that since her [first] husband died she was left with nothing and no one to turn to for help and support, no where to live, and that she had no means of earning money. She said this is because the house she was living in, along with all her belongings and personal possessions, had been burgled and burnt down. She said she was scared that her children in Fiji would not be able to help and assist her in any way because they were facing great financial hardship and that she would face moral, emotional and verbal and financial hardship if she had to return to Fiji. The applicant claimed that the situation in Fiji had not changed or improved since she left Fiji and that since her departure another coup had occurred. She claimed that the racial tension had increased and that safety is at risk. She said that she feared losing the bond and attachment she has created with her children and family in Australia. She claimed that the authorities in Fiji have never provided her with any support or protection in the past in relation to her personal security or finding a place to live.

Submitted with the application were photocopies of a page of two Fijian passports issued to the applicant in the late 1990s and in [Year 6] evidencing various visas. Also attached were letters from [Year 6] from [City B] Fire Station and [City B] Police station confirming that the applicant's house burnt down in [Year 6]. The applicant noted in the application form that she did not have any difficulty obtaining travel documents and that she left India legally.

Migration history

The applicant has made numerous extended trips to Australia since the mid 1990s. She last arrived in Australia in [Year 4] and has not departed since that time. According to the Departmental files the applicant married an Australian citizen born in Fiji in [Year 2]. The couple met in [Year 1] and the applicant was granted a temporary visa in [Year 3] and a permanent visa in [Year 4]. In [Year 4] when the Department was processing a separate application by one of the applicant's children, the Department was advised that the applicant was residing in Australia on a temporary visa and that she was widowed. As a result, the Department made inquiries and discovered that the applicant's sponsor had died in [Year 4] and proceeded to cancel her visa in the beginning of [Year 5] on the basis that she failed to notify the Department about her husband's death. The Migration Review Tribunal (MRT) affirmed the Department's decision in [Year 6]. The applicant sought judicial review of the MRT's decision in early of [Year 6] but withdrew later. The applicant sought Ministerial intervention pursuant to s.351 of the Act and the Minister declined to intervene in [Year 7].

Review application

No further information was provided with the applicant's review application or before the hearing.

Tribunal hearing

The applicant appeared before the Tribunal in late of [Year 7] to give evidence and present arguments. The Tribunal also received oral evidence from a number of her children. The Tribunal hearing was conducted with the assistance of an interpreter. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.

Applicant's evidence

Passport

The applicant provided her 2 Fijian passports to the Tribunal and confirmed she is a citizen of Fiji.

Accuracy of protection visa application

The applicant told the Tribunal that she completed her protection visa application with the assistance of her representative and an interpreter. She confirmed that she understood what had been written and that it accurately reflected her claims.

Residence and family in Fiji

The applicant told the Tribunal that she lived in an area called [Area C] in [City B] from the time she was born in the 1950s until she moved to [Town A], also in [City B] and about [stated number of] hours away, when she was married in the 1970s. She said whenever she returned to Fiji she always lived in [Town A]. Asked who she lived with when she was in Fiji the applicant replied that she lived with her husband, her mother in law, and her several children. She said that her husband died in the late 1990s and stated which of her children were now living in Australia. She said that one of her children has children and a spouse and that her other children aged in their late twenties live in Fiji. She said that her children in Fiji are married, one with children and one is unmarried. Asked where she stayed when she would return to Fiji, the applicant replied that she used to stay with her children, their spouses and their child in the same house that she used to live in with her husband. She told the Tribunal that she has several siblings living in [Town A] in Fiji and that she is still in contact with them. Asked about her second husband's children, the applicant replied that he has a number of children living in Fiji, and some of his children living in Australia. She said that she has a lot of contact with one of her previous husband's children. She said that she sometimes lives with that child in [Suburb D] and sometimes lives with her child in [Suburb E]. She said it varied and she sometimes spends a week at each and sometimes 2-4 days. The applicant confirmed that she never worked in Fiji and that she has not worked in Australia.

Claims for protection

When the Tribunal asked the applicant why she believes she is a refugee she was unable to respond and indicated it would be of assistance if the Tribunal asked her questions. The Tribunal noted that in her application she claimed that she would be mistreated and asked why she believed this was the case. The applicant replied that in

Fiji she was afraid of people because they rob and destroy houses and that the government was not helping. Asked why people did this the applicant replied that she did not know. Asked if she had ever been harmed in Fiji the applicant replied that she had not sustained any injuries but that she had had problems with burglaries. She told the Tribunal that somebody broke into the house several years ago when she was still living in Fiji. She indicated that an animal was stolen and that they were robbed several times in late 1990s. The Tribunal noted that the applicant had not returned to Fiji since [Year 4] and asked why she believed it was not safe to return to Fiji if the last time she experienced any problems was in the late 1990s. The applicant replied that her house had been destroyed by fire in [Year 6] and therefore she had no shelter. The applicant confirmed that the house that had burnt down was the house in which she used to live with her first husband. When the Tribunal noted that the applicant had previously said that her children were living in that house with their spouses, the applicant replied that her child was still living in the house that had been burnt and that they was still able to live there. Asked why if she returned to Fiji she could not also live there, the applicant replied that they were living in only one room and there was not space for her.

When the Tribunal asked if there was any other reason why she did not feel it was safe to return to Fiji, the applicant replied that she did not have anyone there and that her house had burnt down. The Tribunal noted that she had several siblings living in India and children with partners and a grandchild and asked why she could not live with any of those family members. The applicant replied that her siblings had their own families and indicated therefore that she could not live with them. She said that her children did not have a proper house right now and were living with their friends and therefore that she could not live with them either.

In view of her evidence that the last time she had personally experienced problems in Fiji was in the 1990s, the Tribunal asked the applicant why she had not applied for protection before. The applicant replied that she already had a permanent visa. The Tribunal noted that her other visa was granted in [Year 3] and asked why therefore she had not applied for protection between her first visit to Australia in the 1990s and [Year 3]. The applicant did not answer the question and after further questioning did not respond.

When the Tribunal noted that the applicant had referred to the political instability in Fiji in relation to her claims, the applicant replied that the political instability was very bad. Asked to elaborate on how it affected her life, the applicant replied that her house had been burnt, that indigenous Fijians had made their homes close to her and therefore she felt scared of them and had always felt scared of them. Asked why she believed they burnt down her house, the applicant's representative clarified that the applicant was not claiming her house was burnt down by anybody but simply that it burnt down. Asked when her house was burnt down, and who burnt it, the applicant replied that it burnt when her children were not at home and that she did not know how it burnt down but that she did not think it was by indigenous Fijians. When the Tribunal sought clarification that the problems the applicant had experienced in Fiji was confined to several burglaries in the late 1990s, the applicant replied that she may be burgled in the future and went on to say that anything can happen. The Tribunal noted that the applicant had claimed in application that she had "previously been harassed on many occasions". When the Tribunal sought clarification that this

statement was a reference to the burglaries and nothing further, the applicant confirmed that it was not a reference to anything else. When the Tribunal asked about the latest coup in Fiji and how it had affected the applicant, the applicant replied that she did not know.

Evidence from applicant's child [Person F]

One of the applicant's children [Person F] told the Tribunal that their mother has been staying with them and that if she returns to Fiji she will have no house as it has been burnt. [Person F] said that their sibling who was living in the house at the moment did not have a lot of room for their mother and that this sibling is financially very poor and can not look after their mother. [Person F] said that since their step father had passed away their mother has been staying with them. [Person F] said that they were supporting their mother financially and also in terms of the trauma she has experienced having first lost their father and now having lost her second husband. [Person F] said that their mother is very close to their children and that they have a young child, and other youngest children. [Person F] said that their mother looks after them because they and their spouse both have to work. [Person F] said that their children are more attached to the visa applicant than they are to [Person F] because of the amount of time the visa applicant spends caring for them. [Person F] said that if their mother returns to Fiji there would be nowhere for her to go and they did not think that she would cope. When the Tribunal noted that the applicant also had other children living in Fiji, [Person F] replied that their siblings are now living with friends so therefore they could not offer their mother accommodation. Asked if there was any other reason why they felt their mother could not return to Fiji, the witness replied that she had nowhere to go, no financial support, that she had never worked, and that she had nowhere to live, having no house.

Evidence from applicant's child [Person G]

[Person G] told the Tribunal that they had come to give evidence to support their mother. [Person G] said that since their father died she had had a very difficult time. The witness was visibly upset and indicated that they personally felt very angry at the way she had been treated by the Department in respect of her visa cancellation. Asked why they believed their mother would not be safe if she returned to Fiji the witness replied that according to Hindu tradition it would be difficult for someone who had been married and widowed to be treated with compassion. [Person G] referred to the fact that she had lost her house and that her other children were in a dilemma and did not have accommodation themselves. The witness told the Tribunal that their mother stays with them on the weekends and with [Person F] during the week. [Person G] said that their step mother is used to their ways and spoke of the assistance and support she had provided to them and their family. [Person G] said that their mother would have no form of income as she could not get a job and that she would not be safe and secure for her being alone in Fiji. The witness told the Tribunal that they hoped very much that their mother would be able to remain in Australia, that their children and family appreciate her, and that she had stood by their father.

Applicant's representative's submission

The applicant's representative told the Tribunal that the applicant's claims were driven by strong subjective as opposed to objective fears driven by material changes in the visa applicant's personal circumstances. The representative referred to the problems the applicant experienced in the late 1990s when windows in her house were broken and animals were stolen. He noted that the applicant had travelled to and from Fiji from the late 1990s to [Year 4] and the Tribunal's expectation that she would have applied sooner if she feared persecution as claimed. He said she was a permanent resident at the time and her life changed when her visa was cancelled. The representative said the applicant's house burnt down not by the neighbours or due to community tensions and that it would be wrong to infer that was the case because they did not know who had been responsible. He said the applicant is now without residence and that her largely subjective fears are generated by the uncertainty of what her future holds in Fiji. He contrasted this with her experience in Australia where she was in a loving and supportive environment. The adviser referred to the applicant's evidence it was not culturally appropriate for her to live with her several siblings and that she was unable to live with her children. The adviser submitted that the applicant's age, her status as a widow, and her cultural circumstances did not constitute a claim for a protection visa and went on to say that his client was not seeking to dispute the country information referred to in the Department's decision. The applicant's adviser submitted that the applicant's circumstances as a whole may enliven a request for Ministerial intervention, having regard to her age, the time she had spent in Australia, her relationship with her second husband and the fact that she continues to enjoy the support of one of her children.

Asked if there was anything further she wished to add, the applicant replied that having lived in Australia for a long time, socially it would be very difficult for her to return to Fiji and that from a safety perspective, it would also be very difficult because she would have to live at home alone in Fiji.

FINDINGS AND REASONS

On the basis of the photocopied pages of the applicant's passports the Tribunal accepts that the applicant is a national of Fiji.

The applicant has made various claims for protection some of which overlap. She has claimed protection on the basis of the political unrest in Fiji, burglaries and a general lack of security in Fiji. She also claimed she feared harassment from the indigenous Fijian community, persecution because she is a member of a particular social group, namely a 'Fiji Indian widow in her mid fifties who does not have the support of family in Fiji' and more generally because she does not have financial support in Fiji, a house or the ability to earn money.

The applicant told the Tribunal that in the late 1990s her house was burgled on several occasions and that her house was destroyed by fire. The applicant told the Tribunal that she was afraid of people in Fiji because they rob and destroy houses. She told the Tribunal that Indigenous people had made their homes close to her and her family, and that she and her family felt scared of them. Asked how long she had felt scared of them, the applicant replied always. Asked why she believed they burnt her house the applicant replied that it was burnt when her children were not at home and that she did not believe it was burnt by Indigenous Fijians. The applicant's representative also

clarified that the applicant was not claiming her house was burnt down by her indigenous Fijian neighbours or due to community tensions. When the Tribunal asked the applicant why she believed people robbed and destroyed her house she replied that she did not know. The Tribunal finds that the applicant's house was not destroyed by fire due to any Convention related reason. When the Tribunal noted that the applicant had claimed in her application that she had 'previously been harassed on many occasions', the applicant confirmed that the statement was a reference to burglaries and nothing more. The Tribunal accepts that the burglaries occurred in the late 1990s and that the applicant's house was burnt, so that only one of her children can now reside there. The Tribunal finds that the burglaries the applicant has experienced and the destruction of her house by fire are due to general criminality in Fiji and not due to any Convention related reason.

Asked about her claims for protection based on the political instability in Fiji, the applicant replied that the political instability is very bad. Asked to elaborate she referred to the burning of her house and the fact that she may be burgled in the future. When the Tribunal asked about the latest coup in Fiji and how it had affected the applicant, the applicant replied that she did not know. The Tribunal finds that there is nothing from the applicant's past experiences and nothing in relation to her particular circumstances to suggest that she has been, or would be, selected to have her possessions stolen or destroyed in the future for any Convention reason. The Tribunal finds that the applicant's fears in this regard are not well founded. Further, as noted above, under s.91R(1) of the Act persecution must involve serious harm, systematic and discriminatory conduct, and one or more of the Convention reasons must be the essential and significant reason for the persecution. The Tribunal is not satisfied that the harm the applicant fears meets the requirements for persecution as qualified by section 91R(1), in particular the requirement for systematic and discriminatory conduct. The Tribunal therefore finds that the applicant does not hold a well founded fear of persecution due to political instability in Fiji or for any political opinion held by the applicant.

The applicant and the witnesses told the Tribunal another reason the applicant fears returning to Fiji is because she did not have anyone there, she does not have accommodation or financial resources to support herself financially. The applicant gave evidence that she has children, and their spouses, a grandchild and several siblings living in Fiji. She said it was culturally not appropriate for her to live with her siblings and her children also did not have accommodation to offer her. She also has a number of children in Australia who are clearly very committed to her well being. In view of the care they demonstrated for her at the hearing the Tribunal does not accept that if the applicant returned to Fiji her children in Australia would not continue to provide for her financially such that the economic hardship she would suffer would threaten her capacity to subsist and constitute 'serious harm'. The Tribunal therefore finds that there is no real chance she will suffer serious harm in the future. Further, the Tribunal finds that the difficulties the applicant has referred to, including not having accommodation or the ability to support herself financially, do not meet the requirements for persecution as qualified by section 91R(1). This is because they do not involve any systematic and discriminatory conduct for the essential and significant reason for one or more Convention grounds and therefore do not constitute persecution.

The applicant has not returned to Fiji since [Year 4]. According to her evidence the problems she personally experienced in Fiji occurred in the late 1990s. When the Tribunal asked the applicant why, if she feared persecution from the late 1990s she did not apply until [Year 7], she said she was granted a permanent visa in [Year 3]. The applicant's response does not explain why she did not apply for protection between the late 1990s and [Year 3]. On the basis of the applicant's failure to seek protection in the period of the late 1990s to [Year 3], and the absence of any reason to explain the failure, the Tribunal finds that the applicant did not have a genuine fear of persecution during that period. The fact that the applicant did not have a genuine fear at the time the burglaries occurred, or for a few years afterwards, leads the Tribunal to question whether the applicant genuinely holds a fear of persecution on that basis now. In any event, for the reasons outlined above, the Tribunal finds that any subjective fear of persecution that the applicant holds now is not well founded and that what the applicant fears does not meet the requirements of section 91R(1) to constitute persecution. Therefore the Tribunal is not satisfied the applicant has a well founded fear of persecution if she returns to Fiji for reasons of race, political opinion, membership of a particular social group, or for any other Convention reason now or in the foreseeable future.

CONCLUSIONS

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.

While the applicant is not a person to whom Australia has protection obligations, the Tribunal feels sympathy for the applicant who has been widowed and does not have the security of an education or past employment. The Tribunal also feels sympathy for the applicant's Australian family members. The applicant's young grandchildren share a close relationship with her as does her child who gave evidence that she had stood by their father and that another child son felt very upset that her visa was cancelled. At no time did the applicant or her representative seek to mislead the Tribunal in relation to the applicant's claims for protection. The applicant's representative submitted that the applicant's circumstances as a whole may enliven a request for ministerial intervention. The Tribunal has referred to the matters that may be relevant to a request for ministerial intervention but it is not the Tribunal's role to make such a determination. Whether the applicant's circumstances satisfy the criteria for Ministerial intervention under s.417 of the Act is a matter solely for the Minister to determine.

DECISION

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