

071743935 [2007] RRTA 301 (12 November 2007)

DECISION RECORD

RRT CASE NUMBER: 071743935
DIAC REFERENCE(S): CLF2007/113687
COUNTRY OF REFERENCE: Brazil
TRIBUNAL MEMBER: Kira Raif
DATE DECISION SIGNED: 12 November 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 Brazil, 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 her review rights.

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 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 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).

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:

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.

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.

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 documentary material before the Tribunal is contained in Tribunal case file 071743935 and the Departmental case file CLF2007/113687. 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. A summary of the evidence on the files follows.

Primary application

According to the Protection visa application, the applicant is a female born in Brazil. She claims to be of 'Brazilian' ethnicity and Catholic religion. She stated that she speaks, reads and writes Portuguese and English. The applicant has completed many years of schooling and a few years of university studies. She stated that she was a student before coming to Australia and has provided no information relating to her employment. Her parents and siblings remain in Brazil.

The Department's electronic records indicate that the applicant was granted a Student visa and she entered Australia as a holder of that visa. She was granted a further Student visa in Australia. The applicant was issued with a Notice of Intention to Consider Cancellation of her visa on the basis of a possible breach of a condition of her student visa but later a decision was taken not to pursue the cancellation due to errors in reporting. The applicant travelled outside Australia previously for several weeks.

When making the application, the applicant made the following claims in response to Questions 40 – 44 on the application form:

- She left Brazil initially to study and to deflect her personal situation with her family and other relatives and friends. This is because of her sexual orientation, hoping to get their understanding as for a long time she was not feeling comfortable at home.
- She fears that she would be discriminated and morally assaulted inside her own home because her parents and siblings not only understand it but also do not respect the applicant.
- They live in a small town in the countryside and the applicant has family members who are involved in politics. They felt ashamed about her sexual orientation. Her family and friends stand aloof from her.
- Living in Brazil, a Catholic country against homosexuality [sic], she saw no opportunities to build her future in the way she always dreamed. Because of her sexual orientation she would be isolated, discriminated not only from her family and friends, but also from the Brazilian society in general.
- The authorities in her country still react toward homosexuality in order to satisfy the clamor of the Catholic Church [sic].

The applicant also provided a statement with her application in which she repeated the claims set out in the application. The applicant also stated that during the year she stayed in Australia, she studied, worked and conquered her independence and made true friends who accept her as she is. She met a special woman who completes her and makes her happy. The applicant states that she missed her family and decided to go back for holidays with her family. She hoped for a good welcome but nothing changed and they continued to be rigid and embarrassed with her presence. After her stay in Brazil she realised that she has definitely no opportunity to grow, to have support and respect there and no conditions to have a reasonable quality of life. She was disappointed and hurt returning to Australia, she tried to re-establish her life here but she was feeling off with studies and work and worried about personal problems. This is a temporary phase and she has an enormous willingness to grow in this country.

The applicant provided with the application a copy of her passport which confirms the information the applicant provided on the application form that she had lived in Country A previously.

Application for review

The delegate decided not to grant the visa to the applicant. The applicant sought review of the delegate's decision. The applicant did not provide any further written material to the Tribunal when making the application for review.

The applicant appeared before the Tribunal to give evidence and present arguments. Her oral evidence is summarised below.

The applicant said that she is currently undertaking a course and will complete her studies in the near future. She said that she works 20 hours a week and that is how she pays for the course. When she came to Australia, she received support from her parents but now she does not because after she travelled there her parents stopped supporting her because they want her to be straight and to follow the rules. The Tribunal pointed out that her parents were aware of her homosexuality before she travelled to Australia and they initially paid for the course. The applicant agreed. The Tribunal asked her why her parents supported her in the beginning despite knowing that she was a homosexual. She said that they paid all the expenses before she came; her parents thought that it was only a stage and that she would change. When she travelled to Brazil, she told them that she wanted to make them happy but she would not change and she could not live like that. She said that her parents never had a gay friend, her father is a rough man and they live in a small town. When she came out, her parents thought she was sick. The family has politician friends and this makes her family known and popular.

The applicant said that she could not live in Brazil, she always knew that she was gay and tried to learn English from the young age as she knew that her parents would never accept it, she knew that she would have to live overseas and be happy. Every time she speaks to her mother, she does not want to talk to her and does not want to know about her. Her mother attends church three times a week asking God for help. It is uncomfortable, everyone talks about her.

The Tribunal asked the applicant what she thought may happen to her if she were to return to Brazil. She said that she would have to live a life her parents want her to live. She would have to be single for the rest of her life to make her family happy. She never thought about her life and future in Brazil, if she has to live there she would be unhappy for the rest of her

life. The Tribunal asked the applicant why she had to remain with her parents if she returned to Brazil. She said that there are no opportunities. She completed a degree in University but she would not get a job in her chosen field because she has no connections. The Tribunal pointed out that the applicant has tertiary qualifications and is undertaking studies in Australia. The Tribunal asked the applicant why she would not be able to obtain a job in Brazil. She said that she completed her qualifications for her parents, she did everything to keep her parents happy. The Tribunal repeated its question. The applicant said that people in Brazil are Catholic and are against homosexuals, she will have no opportunities. She wants to be who she is, people will hate her. People judge her only because she is gay and will not accept her. She said that there are gays in Brazil but they are never happy. Her family is hard to deal with.

The Tribunal notes its concern that what the applicant's claims may not constitute 'serious harm' as required by the Australian law. She said that she wants to be who she is, she wants to be happy and to be with a girl she loves. She travelled to Brazil with a girlfriend and everybody passing by would look at them and swear at them. She does not want to lead such a life.

The Tribunal asked the applicant why she had not sought protection in Country A. She said that when she went to Country A, she had not come out with her parents yet. She went there to study English. She came out to her parents earlier and then she decided to travel to Australia as she did not want to be in Country A. The Tribunal again pointed out that having difficulties with her parents and facing discrimination from the society may not amount to 'serious harm'. She said that it is difficult for her to pretend to be someone she is not, to keep people happy. She wants to lead a life where she is happy.

The Tribunal asked the applicant if there was anything else that may happen to her if she returns to Brazil. She said that she would have a bad life. She will not be happy and will face discrimination, people would not accept her. She will have to get a job and be unhappy, she does not want a future like that. She wants to be herself and be loved, she wants to live her life and be happy and it is impossible to have that in Brazil. She will always be judged as a homosexual.

Information from Other Sources

The US State Department Report on Human Rights Practices 2006, released in March 2007, relevantly states:

State and federal laws prohibit discrimination based on sexual orientation, and the federal and state governments generally enforced these laws, as there was a history of societal violence against homosexuals.

The Secretariat of State Security in Rio de Janeiro State in partnership with NGOs operated a hot line and offered professional counselling services to victims of antihomosexual crimes.

According to the NGO Bahian Gay Group, 81 homicides of homosexuals were reported between January and July, compared with 63 killed during the same period in 2005.

There were incidents of violent attacks against homosexuals carried out by neo-Nazi groups in the southern part of the country. In March and April a group or groups of

neo-Nazi skinheads attacked several homosexuals in the Jardim Paulista neighborhood of metropolitan Sao Paulo.

FINDINGS AND REASONS

The applicant travelled to Australia on a Brazilian passport and claims to be a national of Brazil. The Tribunal accepts that the applicant is a national of Brazil and has assessed her claims against Brazil as her country of nationality.

The applicant essentially claims that she will face persecution due to her homosexuality. She claims that she would have a difficult life in Brazil, that her parents would not accept her and that she would face discrimination from the society, that she would not be able to live openly or in the manner which she prefers. The applicant claims that she would be discriminated against and morally assaulted at home by her family, that she would be uncomfortable with her family, that people talk about her and her family is hard to deal with, that she would not live a life her parents want her to leave and that she would have to remain single and unhappy for the rest of her life. The applicant claims that Brazil is a Catholic country and she would have no opportunity to build her future in the way she wanted and to grow and that she would not have a reasonable quality of life. The applicant claims that she would be unhappy, discriminated by the society and that she would not be able to live as she wants.

The Tribunal accepts that the applicant is a homosexual and that she wishes to practise her homosexuality. The Tribunal accepts that the applicant ‘wants to be herself’ and that this may entail practising homosexuality openly and making others aware of her homosexuality. The Tribunal also accepts that the applicant’s parents and family do not support the applicant because of her homosexuality and that she may face ostracism from family and friends. The Tribunal also accepts that Brazil is a Catholic country and that the societal attitudes may be against homosexuality and that the applicant may face societal discrimination. The Tribunal accepts that the applicant may be unhappy in Brazil and that she may remain single.

However, the Tribunal is of the view that the harm that the applicant fears – including alienation and ostracism, discrimination, dislike and her inability to lead a happy life – do not amount, singularly or cumulatively, to ‘serious harm’ for the purpose of s 91R(1). In reaching this finding, the Tribunal does not accept that these matters would be of such magnitude as to prevent the applicant from earning a livelihood, that the applicant would suffer significant economic hardship that may threaten her capacity to subsist or that she will be denied access to basic services although the Tribunal does not consider the matters set out in s. 91R(2) to be exhaustive. The applicant also confirmed in oral evidence that she would be able to find employment in Brazil, although stating that it may be difficult without connections.

The Tribunal also notes that the country information cited above indicates that state and federal laws prohibit discrimination based on sexual orientation, and the federal and state governments generally enforced these laws. The Tribunal considers the following comments to be relevant:

Persecution for the purposes of the Convention connotes some official approbation of the feared conduct, or at least official failure or inability to do something about it, when the general standards of civilised countries would entitle the putative refugee to the protection of the State (*MMM v MIMA* (1998) 90 FCA 324 per Madgwick J referring to Applicant A per Brennan CJ)

The information before the Tribunal indicates that there is no official approbation or official failure or inability to deal with the conduct feared by the applicant.

As the Tribunal found that the harm feared by the applicant does not amount to 'serious harm', the Tribunal does not need to consider whether the applicant's claims are based on her membership of any particular social group and whether a Convention reason is the essential and significant reason for the conduct feared by the applicant.

Having considered the applicant's evidence singularly and cumulatively, the Tribunal is not satisfied that there is a real chance that the applicant will face persecution for a Convention reason if she were to return to Brazil now or in the reasonably 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.

DECISION

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 Migration Act 1958. Sealing Officer's I.D. PRRRNP</p>
