

1213043 [2013] RRTA 187 (29 March 2013)

DECISION RECORD

RRT CASE NUMBER: 1213043

DIAC REFERENCE(S): CLF2012/3868 H10/231

COUNTRY OF REFERENCE: Syria

TRIBUNAL MEMBER: Filip Gelev

DATE: 29 March 2013

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(aa) of the Migration Act.

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 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 Syria, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] January 2012 and the delegate refused to grant the visa [in] August 2012.

RELEVANT LAW

3. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

4. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugee as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
5. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.
6. 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, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.
7. 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.

8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
9. 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)). Examples of 'serious harm' are set out in 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.
10. 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.
11. 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.
12. 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 being persecuted for a Convention stipulated reason. 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.
13. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
14. Whether an applicant is a person in respect of 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.

Complementary protection criterion

15. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the

Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').

16. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
17. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. Based on the copy of the applicant's passport, the Tribunal accepts that she is a Syrian national and has assessed her claims against that country for the purposes of ss.36(2)(a) and 36(2)(aa).
19. The applicant originates from [Town 1], near the city of Homs. The applicant is a Sunni Muslim by religion. She first came to Australia in January 2011 on a student visa with a 'no further stay' condition. She sought a waiver of that condition in order to apply for a partner visa. The Department of Immigration refused the waiver request. In September 2011 the applicant married an Australian citizen. There is no evidence before the Tribunal that the relationship has ended. The applicant felt compelled to apply for protection because she did not feel in a position to return to Syria and apply for a partner visa from there.
20. The applicant conceded that she had never been politically active in Syria (see submissions by her representatives, at folio 108 of the Tribunal file). She made a general claim that the Sunni majority suffer discrimination by the ruling minority. In terms of harm, she only claimed that her school results were originally graded as 'fail' – because of her Sunni faith – but were revised to a 'pass' The Tribunal agrees with the finding of the delegate that does not amount to serious harm. The Tribunal finds that she has not suffered serious harm in the past for reasons of her Sunni religion or for any other Convention reason.
21. It was submitted on behalf of the applicant that if she were to return to Syria, the applicant would be perceived as an opponent of the government because she is a Sunni Muslim and further because she has sought asylum in Australia.
22. In support of these claims the applicant provided general country information indicating that the war in Syria is largely between Sunni Muslims on one side and Shias and Alawites on the other. The applicant's representatives also submitted country information according to which unsuccessful asylum seekers are being persecuted on their return to Syria. It was submitted that returning to Syria after unsuccessfully claiming asylum in Australia would lead the

authorities to impute the applicant anti-government views. Thus, it was argued that she would face a real chance of persecution for reasons of her Sunni religion, her imputed or actual political opinion and her membership of a particular social group, namely, failed asylum seekers. The applicant's representatives referred to RRT country advice SYR38462 (15 April 2011) in support of that proposition.

23. The Tribunal is not satisfied that someone with the applicant's profile – a woman who had only just turned [age deleted: s.431(2)] when she left Syria and who has not been involved in political activities either in Syria or Australia – would be considered to hold anti-government political views or a member of a particular social group of failed asylum seekers. While the RRT country advice contains some country information according to which failed asylum seekers without any political profile have been persecuted, the Tribunal is not satisfied that the applicant would be identified as a failed asylum seeker. She departed Syria on a student visa to Australia and she would be returning to Syria in order to apply for a partner visa to Australia.
24. The authorities would have no reason to consider that she might have sought asylum. In any event, the country information refers to 2009 (Amnesty International and UK Home Office) and 2010 (Danish Immigration Service), that is, prior to the commencement of the civil war. In any event, on the evidence before it, the Tribunal is not satisfied that at present, the government, caught in a bloody civil war, would have either the resources or any interest in interrogating and harming a [age deleted: s.431(2)]-year-old woman ostensibly returning from a period of study in Australia.
25. Therefore, on the evidence before it, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
26. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa).
27. Syria is in the midst of a civil conflict which has killed tens of thousands of people.¹ Recent estimates put the number of refugees at one million and millions more internally displaced.²
28. As already indicated, the applicant originates from [Town 1], near the city of Homs. The applicant's evidence was that she feared going back to Syria and her home town of [Town 1] because of the fighting between rebel forces and the government. In her written application she said that her family members had left their homes and had not returned fearing for their safety. Two neighbours had been killed and "thrown on street outside our home".
29. The country information is consistent with this claim. [Country information deleted: s.431(2)]
30. The government controls territory to the east of Homs. The rebels control a strip of land to the west of Homs. Further west, control swaps once more – the government still holds Tartus and Latakia, coastal towns on the Mediterranean.³ In early 2012 it was held by the rebel

¹ "Where is the Syrian conflict heading", *Al Jazeera*, 17 March 2013, accessed at <http://www.aljazeera.com/programmes/insidesyria/2013/03/20133177557742685.html> on 26 March 2013.

² "Number of Syrian refugees hits one million mark", *Al Jazeera*, 6 March 2013, accessed at <http://www.aljazeera.com/news/middleeast/2013/03/201336155511798120.html> on 26 March 2013

³ See "Syria Uprising Map: March 2013 (# 9)", *Political Geography Now*, accessed at <http://www.polgeonow.com/2013/03/syria-uprising-map-march-2013-9.html> on 26 March 2013.

forces but after July 2012 it was mostly under government control.⁴ At the time of this decision, country information indicates that most of Homs is still being in the hands of President Assad's armed forces.

31. As late as 9 March 2013, reports were talking about Homs dealing with the "aftermath" of the civil war,⁵ but by 10 March there were new reports of heavy fighting and a surprise dawn attack by the rebels.⁶ Country information provided by the applicant's representatives in relation to Homs refers to the indiscriminate killing of civilians such as the death of about 200 civilians in February 2012.⁷
32. Based on the applicant's evidence and the country information, the Tribunal is satisfied that the applicant faces a real risk of significant harm, arbitrary deprivation of life, in the area of [Town 1] and Homs because of the continued hostilities between the opposing sides in the civil war. The Tribunal is satisfied that she is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
33. The Tribunal has considered whether the significant harm the applicant faces a real risk of is one faced by the population of the country generally and is not faced by the applicant personally under s.36(2B)(c). It is difficult to imagine a situation in which harm that is faced by a population of a country generally is at the same time not faced by a person (the applicant) personally.
34. The explanatory memorandum and second reading speech that accompanied the introduction of the complementary protection provisions provide no assistance in its interpretation and application. The explanatory memorandum comments that the "danger of harm must be personal and present" whilst the second reading speech states that a "personal or direct risk can be found in instances where the significant harm is faced by a broad group, so long as that harm is personally faced by the person seeking protection".
35. In the circumstances of this case, the country information about Syria indicates that the population of the country generally faces a real risk of harm, and in particular arbitrary deprivation of life because of the fighting between government forces and rebels, but it is also a real risk that the applicant faces personally. Furthermore, the country information indicates that, unlike disputed areas such as [Town 1] and Homs, some parts of the country are firmly under rebel control and others under government control.⁸ Therefore, the Tribunal finds that the real risk of significant harm is not one faced by the entire population of Syria generally. Accordingly, I find that the applicant is not excluded by the operation of s.36(2B)(c).

⁴ See "Syria Divided by Armed Conflict" map of 2 February 2012 and "Syrian Uprising Map: August 2012 (#6)", *Political Geography Now*, accessed on 26 March 2013 at <http://www.polgeonow.com/2012/02/syria-divided-by-armed-conflict.html> and <http://www.polgeonow.com/2012/08/syrian-uprising-map-august-2012-rebels.html> respectively.

⁵ "Homs deals with aftermath of Syria unrest", *Al Arabiya*, 9 March 2013, accessed at <http://english.alarabiya.net/en/News/2013/03/09/Homs-deals-with-aftermath-of-Syria-unrest.html> on 26 March 2013.

⁶ "Rebels in surprise attack on Homs district", *Al Jazeera*, 10 March 2013, accessed at <http://www.aljazeera.com/news/middleeast/2013/03/2013310101714486702.html> on 26 March 2013.

⁷ "At least 200 killed in latest Syrian bloodshed", *ABC*, 4 February 2012, accessed at <http://www.abc.net.au/news/2012-02-04/activists-killed-as-syrians-remember-massacre/3811460> on 26 March 2013.

⁸ See e.g. "Syrian rebels claim near control of key province", *NY Times*, 14 February 2013, accessed at http://www.nytimes.com/2013/02/15/world/middleeast/syria.html?_r=0 on 25 March 2013.

36. Section 36(2B)(b) provides that there is not a real risk of suffering significant harm if the person could obtain from an authority of the country protection such that there would not be a real risk that they would suffer significant harm. In light of the country information about the dire security situation in Syria and the fact that the government is controlled by Shi'as and Alawites fighting against Sunnis, the Tribunal is satisfied that the authorities cannot provide the applicant with state protection. There is no evidence to indicate that the applicant would be able to obtain state protection that would remove the real risk of significant harm. Accordingly, the Tribunal finds that the applicant is not excluded by the operation of s.36(2B)(b).
37. Section 36(2B)(a) provides that there is not a real risk a person will suffer significant harm if it would be reasonable for the person to relocate to another area of the country where there would not be such a real risk. The applicant has married an Australian citizen. There is no information before the Tribunal that the applicant's husband either has the right to accompany her to Syria if she were to return there or that it would be reasonable to require him to do so. The Tribunal finds that the applicant is likely to have to return to Syria by herself, without the protection of her husband. As a single [age deleted: s.431(2)] year old woman she would be highly vulnerable. Based on the country information about the high level of violence and insecurity in the country, even though some parts of the country appear to be firmly under the control of the Sunni rebels,⁹ the Tribunal is not satisfied that in the applicant's personal circumstances it would be reasonable for her to relocate to any other part of Syria.

DECISION

38. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(aa) of the Migration Act.

⁹ See "Syria Uprising Map: March 2013 (# 9), *Political Geography Now*, accessed at <http://www.polgeonow.com/2013/03/syria-uprising-map-march-2013-9.html> on 26 March 2013.