

0903238 [2009] RRTA 615 (26 June 2009)

DECISION RECORD

RRT CASE NUMBER: 0903238

DIAC REFERENCE(S):

COUNTRY OF REFERENCE: Korea, Republic Of

TRIBUNAL MEMBER: C Packer

DATE: 26 June 2009

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of the Republic Of Korea applied to the Department of Immigration and Citizenship for Protection (Class XA) visas.
3. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter. The delegate refused the visa application on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal for review of the delegate's decisions. 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 applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

5. 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.
6. 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).
7. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A

person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

Primary application

19. The Department received the application which contained various details.
20. In Part B the applicant indicated:
 - She was applicant 1. She included her husband and child.
 - She indicated at question 6 that she had never been convicted of a crime or offence, or been charged with an offence that was awaiting action.
 - She indicated no other close family or relatives.
21. In Part C the applicant indicated:
 - She was female, born in Korea and had Korean citizenship.
 - She provided her date of birth and age at the time of application.
 - She required a Korean interpreter. She did not indicate which languages she could speak, read and write.
 - Her ethnic group was 'Korean'.
 - She indicated no religion.
 - She was married.
 - She travelled to Australia as a visitor.
 - Her current passport was issued by the Ministry of Foreign Affairs and Trade.
 - She indicated no other travel overseas.
 - She did not indicate what her Australian visa had been or when issued
 - She indicated that she had lived at the following:
 - An address at Location A for 2 years
 - An address at Location B for 3 years.
 - An address at Location C for 6 years.
 - She received 15 years of schooling in Korea
 - She indicated 'no employment' when asked for details of past employment.
 - She left Korea legally.

- She did not have any difficulties obtaining a travel document.
 - At Part C, Schedule A she indicated no convictions, charges or investigations.
22. In her application the applicant's claims appear as answers to questions 40 to 45 of the application. The Tribunal has concisely summarised her claims (other than where quoted):
- [40 I am seeking protection in Australia so that I do not have to go back to]**
- 'Particular group'
- [41 Why did you leave that country?]**
- 'I left my country because of my ex-fiancee who always was violence and threatened me during relationship in Korea'.
- [42 What do you fear may happen to you if you go back to that country?]**
- She states he has a mental problem and threatened and assaulted her. Her parents gave her money and she came to Australia. If she returns he will kill her, the husband and child.
- [43 Who do you think may harm/mistreat you if you go back?]**
- He assaulted her. He will harm her and her family in Korea.
- [44 Why do you think this will happen to you if you go back?]**
- He has a mental problem and his family blame her. He can't give up looking for her. She will provide information.
- [45 Do you think the authorities of that country can and will protect you if you go back? If not, why not?]**
- The police won't deal with domestic violence. She reported it many times to police. They came late. One time she jumped from a window, broke her ankle, and hid. He threatened her parents.
23. The husband and son completed Part Ds- for applicants who do not have their own claims to be a refugee.
24. The applicant produced copies of the first page of her passport to the Department, as well as for her husband and child. Her passport page showed:
- The Korean passport date of issue.
 - The passport expiry date.
 - The passport is in the applicant's name.
 - The passport contained the applicant's date of birth.
25. The applicants failed to attend a scheduled interview. A letter to their address was returned unclaimed. The officer twice phoned the residential number which went straight to a fax machine. The officer phoned a mobile number which went to a message bank that only allowed a number to be registered- which the officer did.

The delegate's decision

26. The delegate refused the application

The review application

27. The review application contained no further information. The Tribunal wrote to the applicant advising that it had considered all the material before it relating to her application but that it was unable to make a favourable decision on this information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing.
28. No response to the letter was received, and the letter was not returned to the Tribunal unclaimed. She does not have a representative. The letter was sent to the address for correspondence provided by the applicant in the review application.
29. The applicant did not appear before the Tribunal on the day and at the time and place at which the applicant was scheduled to appear. After careful consideration, and pursuant to s.426A of the Act, the Tribunal has decided to make a decision on the review without taking any further action to enable the applicant to appear before it.

FINDINGS AND REASONS

Country of nationality

30. On the basis of her protection visa application, her passport, and in the absence of any contrary indications, the Tribunal accepts for the purpose of this decision that the applicant has Korean nationality, and assesses her claims against that country.

Claims

31. Essentially, the applicant claims to fear persecution in Korea because she suffered domestic violence from a former partner in Korea, at an unspecified time before she came to Australia. She claims that if she and her family return to Korea, the former partner will harm her and her family.

Protection obligations

32. The Tribunal must be satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well-founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.).

33. The Tribunal has before it assertions in support of the applicant's claim for refugee status. The Tribunal has not had the opportunity, through the scheduled hearing, to obtain further information and to test the veracity of the applicant's claims.
34. Accordingly, the Tribunal cannot be satisfied about the claimed events in Korea which led the applicant to leave the country. The Tribunal cannot be satisfied that the applicant suffered harm in Korea. The Tribunal has not had the opportunity, through the scheduled hearing, to satisfy itself as to whether the applicant has a fear because of any Convention reason.
35. It follows that the Tribunal is not satisfied that the applicant has a well-founded fear of persecution for one or more of the Convention reasons, now or in the reasonably foreseeable future, if she returns to Korea. The Tribunal is not satisfied that the applicant is a refugee.

Conclusion

36. The Tribunal is not satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.
37. The other applicants applied on the basis of their membership of the first named applicant's family. The fate of their applications depends on the outcome of the first named applicant's application. As the first named applicant does not satisfy the criterion set out in s.36(2)(a), it follows that the other applicants cannot satisfy the relevant criterion set out in s.36(2)(b) and cannot be granted the visa.

DECISION

38. The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

Member

<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. PMRTJA</p>
