

071817682 [2008] RRTA 13 (17 January 2008)

DECISION RECORD

RRT CASE NUMBER: 071817682

DIAC REFERENCE(S): CLF2007/110449

COUNTRY OF REFERENCE: Fiji

TRIBUNAL MEMBER: Denis O'Brien

DATE DECISION SIGNED: 17 January 2008

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

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 Fiji, 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 his review rights by letter of the same date.
3. The delegate refused the visa application on the basis that the applicant is not a person to whom 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).
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 Refugees 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. Secondly, 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). 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 unable to be controlled 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 (see *Chan per McHugh J* at 430; *Applicant A per Brennan CJ* at 233, *McHugh J* at 258).
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. Thirdly, 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. Fourthly, 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 if 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 relating to the applicant. 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.

Protection visa application

20. In his protection visa application the applicant identified himself as a national of Fiji. He said that he was applying for refugee status because of gender discrimination. He said that he was a gay, Christian male. He referred to an incident when he was caught having sex with a man outdoors and was physically assaulted by the authorities as a result.
21. He said that he feared persecution if he returned to Fiji. He identified as the persecutors "the lawmakers, the police, the military and the Christian homophobic society".
22. He did not consider that the authorities of Fiji would protect him if he were to return because he asserted that Fiji is a very Christian homophobic society.

Hearing

23. The applicant appeared before the Tribunal to give evidence and present arguments.
24. The applicant is aged in his 40's. He is ethnically Indo-Fijian and is a Christian. He was raised in Nadi, and completed high school as well as gaining a degree.
25. The applicant said that ever since he was a young boy he had known that he was a different. He used to enjoy playing with dolls as a child and used to be teased in the school playground for his perceived gay behaviour.
26. He said that that he had a good record in his employment
27. He had been an activist for gay rights in Fiji.
28. He gave the Tribunal further details of the incident which led to his being assaulted. On a road he had by chance met a male friend and the two of them had agreed to have intercourse nearby. Unfortunately, they were seen by the police and both were charged at the local Police Station with offences of unlawful carnal knowledge under the Penal Code. The applicant was then released from custody pending an appearance in court. Around this time he was actively involved with gay and lesbian rights groups opposing protest marches by the Methodist Church against homosexuality.

The protest marches were related to the proceedings in the High Court in which an Australian man, Thomas McCoskar, had brought a constitutional challenge to the Penal Code provisions under which he had been convicted of homosexuality offences.

29. A short time later, the applicant and his friend with whom he had been charged arising from the outdoor incident were rounded up by members of the Military and were taken to a local barracks. There they were physically abused, resulting in a number of injuries.
30. At the hearing the applicant showed the Tribunal his injuries. Scars were apparent and uniform.
31. Following the punishment at the barracks, the military took the applicant to a Hospital, where his wounds were bandaged. His parents were called. He was warned by the military that, if he went to the media, he would be prosecuted and his family would be punished.
32. Since this incident, the applicant has found it necessary to take Valium and Prozac and other drugs to help him sleep. He was persuaded by his family not to engage in further activities in support of the rights of homosexuals in Fiji.
33. In the mid 2000's the applicant appeared in court to face the Penal Code offences of which he had been charged. By this time the High Court's decision in the *McCoskar case* had been handed down. In that decision the High Court had found the provisions of the Penal Code to be unconstitutional and the conviction of Mr McCoskar was quashed. According to the applicant, despite that decision, the magistrate in the applicant's case convicted him of the offence of having unlawful carnal intercourse but the penalty imposed was a good behaviour bond.
34. At the hearing the Tribunal explained to the applicant that it may want to put to him information that could be a reason for affirming the decision to refuse him a visa. It was explained to the applicant that he could respond to the information immediately or he could seek an adjournment in order to provide time for a response.
35. The Tribunal put to the applicant that the country information in relation to Fiji indicated that, particularly in urban areas, homosexual lifestyles were tolerated. The applicant said that they may be tolerated but there was no freedom to express views in favour of a homosexual lifestyle and a homosexual man was not treated with dignity and respect.
36. The Tribunal also put to the applicant that country information suggested that in Fiji homosexual men are able to live a normal lifestyle. The applicant responded that homosexuals in Fiji have to be careful not to be caught engaging in homosexual activity and that most gay men led a double life.
37. The Tribunal further put to the applicant that, since the decision of the High Court in the *McCoskar case*, the police in Fiji had indicated that a person would not be prosecuted for homosexuality offences. The applicant replied that this would depend on the attitude of the police commissioner from time to time and, in recent times in Fiji, there had been several different police commissioners.

38. The Tribunal raised with the applicant that, although the Methodist Church in Fiji had taken a very hard stance against homosexuality and homosexual lifestyles, the Catholic Church had expressed greater tolerance. To this the applicant responded that, even within the Catholic Church, it was impossible for a homosexual man to declare his homosexuality before members of the congregation. To do so would invite exclusion from the congregation.
39. Following the conclusion of the hearing the applicant was given some 5 weeks to provide the following material to the Tribunal:
- medical reports from the Hospital;
 - police records relating to his charges and conviction;
 - witness statements relating to the incident giving rise to the charges; and
 - statutory declarations from the applicant's parents.

The applicant was unable to provide that material.

FINDINGS AND REASONS

40. The applicant impressed the Tribunal as a sincere and truthful witness.
41. The Tribunal finds that the applicant is a national of the Republic of the Fiji Islands and accepts that his claims for refugee status are to be assessed by reference to Fiji as his country of nationality. The Tribunal also accepts that the applicant is homosexual and that homosexuals in Fiji form a particular social group.
42. The Tribunal further accepts that the applicant suffered physical punishment at the hands of the Fiji military because of his homosexuality and that the harm he suffered was serious harm as defined under s.91R(1)(b) and (2) of the Act. The Tribunal further accepts that the applicant is fearful of returning to Fiji.
43. That said, the Tribunal is not satisfied that there is a real chance that the applicant will face serious harm amounting to persecution if he were to return to Fiji now or in the reasonably foreseeable future.
44. The Tribunal accepts the advice of the Department of Foreign Affairs and Trade (Department of Foreign Affairs and Trade 2007, *DFAT Report No.719 – Fiji: RRT Information Request: FJI32446*, 25 October) that homosexuals in Fiji are faced with a higher level of intolerance than are those living in Australia or in other Pacific Island nations. The Tribunal also accepts that the Methodist Church and other religious groups in Fiji have been vocal in their opposition to homosexuality ('Hindus, Muslims back church' 2006, *The Fiji Times*, 24 September; and 'Fiji Methodist leader says homosexuals should be stoned to death' 2003, Radio New Zealand International website, 6 November <http://www.rnzi.com/pages/news.php?op=read&id=7332>). This level of intolerance, however, does not necessarily translate into serious impediments of harm against homosexuals in Fiji, including those who are openly gay.

45. According to DFAT (citing a report of a local equal rights group, Equal Ground Pasifik), over recent years there have been some improvements in general attitudes towards the gay community, particularly in urban areas. Whilst people who are openly homosexual regularly encounter verbal abuse or other discrimination, there are relatively few incidents of physical abuse or harm against the gay community.
46. The Tribunal accepts that the applicant may be subjected to verbal abuse or other similar forms of discrimination in Fiji and appreciates his general fears in this regard. However, the Tribunal is not satisfied that regular and petty acts of discrimination, such as abusive language are serious enough to amount to persecution within the Convention definition.
47. DFAT's analysis, which the Tribunal accepts, suggests that, whilst in the context of the 5 December 2006 coup, there were some complaints from gay or transgender sex workers about ill-treatment at the hands of the military and police forces in the immediate aftermath of the coup, these incidents were consistent with the general increase in alleged cases of abuse that occurred at the hands of the military as part of their "clean-up campaign" According to DFAT, homosexuals are not being mistreated by the police or the military simply because of their sexuality. Whilst the police may not in all instances respond to a call for assistance from a member of the gay community, this does not mean that they are unwilling to do so. The general inability of the police to respond to complaints of crime appears to be attributable to lack of resources
48. DFAT was also of the view that, even though the Penal Code still purports to make homosexual acts illegal, there is more tolerance and flexible interpretation of homosexual acts undertaken in the privacy of one's home. The *McCoskar* decision of the High Court was a landmark decision for gay rights in Fiji and has provided a greater level of legal protection for homosexuals
49. In *Appellant S 395/2002 v MIMA* (2004) 216 CLR 473 at [45] the High Court of Australia said that, if a person claimed refugee status on the ground that the law of the country of his or her nationality penalised homosexual conduct, the first question was whether there was a real chance that the applicant would be prosecuted if returned to the country of nationality. Country information suggests that, in the light of the *McCoskar case*, prosecutions in Fiji for homosexual conduct are unlikely. Of course, public acts involving persons of either gender that might be regarded as publicly offensive may well be subject to the same kinds of laws that make such acts offences in Australia.
50. The applicant in the past suffered serious harm at the hands of the Fiji military. That action by the military was unwarranted and inexcusable. However, the Tribunal is not satisfied that there is a real chance of the applicant again suffering similar treatment by the military if he were to return to Fiji.
51. In sum, based on the totality of the evidence before it, the Tribunal is not satisfied that the applicant faces a real chance of serious harm by members of the wider community, the Church, the legislature, the police or the military for the reason of his sexual orientation or the open display of his sexuality if he were to return to Fiji now or in the reasonably foreseeable future. The Tribunal is also not satisfied that there is a real chance that the applicant will be subjected to prosecution under Fiji's Penal Code

for the reason of his sexual orientation or that there is a real chance that the applicant will be denied protection by the authorities in Fiji for the reason of his sexual orientation. As a consequence, the Tribunal is not satisfied that the applicant's fear of persecution for a Convention reason in Fiji is well-founded.

52. The Tribunal has found that the applicant does not satisfy the requirements for a protection visa. It may, however, be appropriate for humanitarian consideration to be given to his case by reason of the following circumstances:

- the applicant suffered traumatic punishment at the hands of the military in Fiji;
- he has no immediate family in Fiji. His parents and siblings are in a third country. Another sibling lives in Australia;
- he has qualifications and specialised employment experience that may be of benefit to Australia.

CONCLUSIONS

53. 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

54. 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. prrt44