0806764 [2008] RRTA 514 (23 December 2008)

DECISION RECORD

RRT CASE NUMBER:	0806764
DIAC REFERENCE(S):	CLF2008/129750
COUNTRY OF REFERENCE:	United States of America
TRIBUNAL MEMBER:	Antoinette Younes
DATE:	23 December 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 United States of America**,** 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 fax.

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 Refugees 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 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).

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

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.

20. In the application for a protection visa, the applicant claimed that:

    a. If he were removed from Australia to the US, he would suffer "*great emotional hardship from not being able to see my [child]*". He would be banned from seeing his child until the child's mother allows, which is unlikely due to the "*current state of affairs*", or until his child turns eighteen. He would have no contact with his child as the current contact orders are unenforceable overseas. He would suffer emotional harm.

    b. He has already suffered "*mental breakdowns*" while in detention and he would be at further risk if removed from Australia. The mistreatment is consequential to his own circumstances and he would not receive any help from the American authorities because under US law, there is no obligation on the authorities to assist citizens to gain residence in another country. The US authorities would not be able to arrange for his child to live with him in the US; there is no US law that would permit the US authorities to bring his child to the US.

21. The applicant was interviewed by the Department

22. The applicant provided a copy of a report, prepared by a psychologist. The psychologist noted that the applicant had suffered from anxiety and that he had been "*heavily addicted to [substance]*" but that it would appear that the applicant had been substance-free for many years.

HEARING

23. The applicant appeared before the Tribunal to give evidence and present arguments. The applicant was represented in relation to the review by his registered migration agent, who did not attend the hearing.

24. In summary, the applicant gave evidence that his claims are not those ordinarily made. He said his claims relate to mental persecution to which he would be subjected if removed from Australia to the US He said he would suffer mental and emotional torment. He said he last saw his child on a specific date in the mid 2000's. He said if removed from Australia, he would not see his child until the child turns eighteen years old. The applicant stated that the persecution he fears relates to nationality and membership of a particular social group. The Tribunal indicated the matter would be considered further.

25. The Tribunal asked the applicant whom he thought would harm him in the US. He said it is his own circumstances and not necessarily the US authorities. He said the US authorities would not be able to assist him seeing his child The Tribunal indicated to the applicant that if the US authorities are unable to help him, that could be for legal reasons and does not appear to be related to any Convention ground.

26. The applicant told the Tribunal that he has lodged appeals in relation to the Department's decision to cancel his visa. He said he is currently seeking leave to appeal to the High Court.

27. The Tribunal asked the applicant if he was on any medication and he said he was not. The Tribunal explained to the applicant that the Tribunal needed to ensure that he was able to put his case in full before the Tribunal.

28. At the end of the hearing the Tribunal asked the applicant if he needed any more time to comment, or respond. The applicant asked and he was granted further time to provide submissions.

Submissions received post-hearing

29. The Tribunal received from the applicant submissions claiming that:

    a. He has not seen his child for several years. The psychological toll that this has taken on him will likely last for the rest of his life. His fear is that he would not see his child again. "*This fear is substantiated by the fact that the government of the United States would* [not – *sic*] *be of assistance in this regard*".

    b. What he is facing creates the well-founded fear and he believes that refugee definitions are capable of including a person in his circumstances. Both the *Migration Act* and the Convention are silent on whether circumstances "*in and of themselves can create a well-founded fear*". To be deprived of a child is an "*affront to a person's basis and inherent dignity that would result in no other outcome but mental torture…*"

    c. He has a well-founded fear of "*suffering mental persecution by way of deprivation and/or loss of access to my child if I were to return. Secondly it is owing to such fear that they are unwilling to return to their country of nationality…*" His fear is for reasons of his membership of a particular social group, namely "*those people whose return to Australia if foreclosed by operation and implication of s.501 of the Migration Act 1958*".

FINDINGS AND REASONS

30. On the basis of the available information, the Tribunal finds that the applicant is a citizen of the United States of America and that he is outside that country.

31. On the basis of the available evidence, the Tribunal is satisfied that the applicant is capable of putting his case in full before the Tribunal.

32. The applicant claims to fear harm if deported from Australia, namely, "*great emotional hardship from not being able to see my [child]*". The Tribunal accepts that the applicant has a child whom he has not seen for several years. The Tribunal accepts that if the

applicant were deported from Australia, he would not see his child for an indefinite period, which would naturally cause him emotional hardship.

33. The applicant has claimed that the mistreatment is consequential to his own circumstances and he would not receive any help from the American authorities because under US law, there is no obligation on the authorities to assist citizens to gain residence in another country. He claimed that his fear is for reasons of his membership of a particular social group, namely "*those people whose return to Australia if foreclosed by operation and implication of s.501 of the Migration Act 1958*".

34. In consideration of the evidence as a whole and even if the Tribunal were to accept that there is a particular social group of "*those people whose return to Australia if foreclosed by operation and implication of s.501 of the Migration Act 1958",* or indeed any other particular social group, the Tribunal does not accept that the harm that the applicant fears is for reasons of his membership of any particular social group, or his nationality as claimed in the course of the hearing. In consideration of the evidence as a whole, the Tribunal finds that any harm feared by the applicant is a consequence of his potential removal from Australia and is not by reasons of any Convention ground.

35. The applicant said that the US authorities would not be able to assist him seeing his child Even if the Tribunal were to accept that the US authorities are unable to help him, in consideration of the evidence as a whole, the Tribunal is satisfied that the inability to assist is not denied for any Convention ground.

36. In essence and for the stated reasons, the Tribunal does not accept that if the applicant were to be deported to the US, there is a real chance that he would suffer any Convention-related harm in the reasonably foreseeable future, or that he would be denied assistance by the US authorities for any Convention-related reason.

37. In essence, and for the stated reasons, the Tribunal finds that the applicant does not have a well-founded fear of persecution.

CONCLUSIONS

38. 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

39. 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. PRMHSE