

**1003232 [2010] RRTA 561 (1 July 2010)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1003232

**DIAC REFERENCE(S):** CLF2010/24852

**COUNTRY OF REFERENCE:** Serbia

**TRIBUNAL MEMBER:** Jane Marquard

**DATE:** 1 July 2010

**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 Serbia, arrived in Australia [in] March 1998 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] February 2010. The delegate decided to refuse to grant the visa [in] April 2010 and notified the applicant of the decision and her review rights by letter [on 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 Refugees Convention.
4. The applicant applied to the Tribunal [in] May 2010 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 documentary evidence in this matter is contained in the Department and Tribunal files and relevant extracts are set out below.

#### *Department file*

20. In her application the applicant stated that she was born in [year deleted: s.431(2)] in [Village A], Smedervo. She is of Orthodox religion, and is a Serbian citizen.
21. The applicant has a Serbian passport issued in 1998 in [location deleted: s.431(2)], Serbia.
22. She arrived in Australia [in] March 1998 on a family visitor visa. After a number of renewals a bridging visa expired [in] February 2000. She applied for a protection visa [in] February 2010.
23. She had four years of primary education and lists her occupation as a homemaker.
24. She said she left Serbia because her husband was murdered by his father. Consequently her son became depressed and began to drink excessively. Her son stopped working and threatened her. She said that her life was in danger and she had no-one for support. She said she was very scared, and had to leave because her safety would be undermined. She said that she had no spare money or assets. She said she was nervous, anxious and depressed. She said shortly after that, war broke out.
25. When asked what she feared would happen when she returned, she said her son was still threatening to drown her and end her life. She said she was suffering from high blood pressure, diabetes, loss of hearing, tension and anxiety. She said she was unable to travel because of these reasons. She said she had nowhere to live in Serbia and her daughter was supporting her in Australia. She fears her son who is a manic depressant, alcoholic and who hallucinates.
26. When asked if she thought the authorities could and would protect her if she returns she said they would not, and she did not feel safe, and her health would deteriorate further. She said the law does not support personal family issues.
27. At the Departmental interview, the applicant said that her father-in-law was not sure why he killed her husband. Her nephew said that there was an argument between them. At the interview she said her son was born in [year deleted: s.431(2)]. He was [age deleted: s.431(2)] when her husband died. She said that her son threatened to throw her in the well because he lost his job, and she had no money to give him.

*Delegate's decision*

28. The delegate of the Department found that the applicant did not have a well-founded fear of persecution for any of the Convention reasons.

*Submissions to the Tribunal*

29. [In] June 2010 the applicant provided submissions to the Tribunal.
30. She said that she arrived in Australia [in] March 1998 on a visitor visa, supported by her sister, who is an Australian citizen. She said she was incorrectly advised, which led to further visa applications being refused. She said she came to realize recently that she was unlawful and she sought immigration assistance through her daughter.
31. She said that she has two children. Her daughter is an Australian citizen and has lived in Australia with her family since 1996.
32. She said that her husband died in 1992. He was murdered by his father.
33. She stated that since the murder, her son, who lives in Serbia, had become depressed, was alcoholic, and had a mental disorder.
34. She said that her daughter supports her and has done so since 1992.
35. She said that her son threatened her, and at times tried to strangle her as she had no money for his drink.
36. She said that she feared for her life. She said that she had no property as it belonged to her father-in-law, who was sent to prison.
37. She said that her daughter was willing to sponsor her as a parent, but she was not able to apply in Australia.
38. She said that she was scared to go to Serbia as she had no relatives there apart from her son whom she fears.
39. She said that she would present a photograph of her son at hearing, which clearly shows his physical state.

*Independent country information*

40. According to the 2009 United States Department of State Country Report on Human Rights Practices, Serbia is a parliamentary democracy. The report finds that civilian authorities generally maintained effective control of the security forces and that the constitution and law prohibit arbitrary arrest and detention, and the government mostly observed these prohibitions. In regards to the police force and judicial procedures, it appears there is an effective police force, with incidents of police corruption being dealt with by the authorities although there are some concerns about corruption and influence:

“The country's approximately 43,000 police officers are under the authority of the Ministry of Internal Affairs. The police are divided into four main departments that supervise 33 regional secretariats reporting to the national government.

The effectiveness of the police was uneven. While most officers were Serbs, the force included Bosniaks (Slavic Muslims), ethnic Hungarians, ethnic Montenegrins, a small number of ethnic Albanians, and other minorities. The police force in southern Serbia was composed primarily of Serbs, although there were small numbers of ethnic Albanian officers.

There were reports of police corruption and impunity. During the year the government addressed many of the reports.

On March 9, police, in cooperation with the district prosecutor in Kraljevo and the special prosecutor in Belgrade, arrested 35 persons, including 18 active-duty police officers, from Novi Pazar, Raska, and Kraljevo. Police suspected that these individuals received and gave bribes; smuggled oil, meat, alcoholic and nonalcoholic beverages, and other goods across the border between Serbia and Kosovo; and were in illegal possession of weapons and narcotics.

On March 23, the district court in Negotin convicted nine Kladovo border police officers in connection with charges from 2007 that border police allegedly received bribes and allowed customs-free transport of goods across the Serbian-Kosovo border. A deputy border police commander, Andjelka Petrovic, received a 10-month prison sentence, and border police officer Dragan Prvulovic received a sentence of 18 months...

Arrests were generally based on warrants, although police were authorized to make warrantless arrests in limited circumstances, including well-founded suspicion of a capital crime. The law requires an investigating judge to approve any detention lasting longer than 48 hours, and authorities respected this requirement in practice. Bail was allowed but rarely used; detainees facing charges that carried possible sentences of less than five years were often released on personal recognizance.

The constitution and law provides that police must inform arrested persons immediately of their rights, and authorities respected this requirement in practice.

The constitution and law provide for an independent judiciary; however, the courts remained susceptible to corruption and political influence. Observers believed that judicial reform, particularly replacement of judges appointed during the Milosevic era, was essential to eliminating corruption. The 2006 constitution expanded the role of the High Judicial Council (HJC, also referred to as the High Court Council) in the appointment of judges, and gave the parliament the right to appoint eight of its 11 members. Human rights groups and the independent Association of Judges criticized this provision for giving the parliament a controlling voice in judicial appointments and affairs.” <http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136056.htm>

41. In regards to freedom of movement, the report states that the constitution and law provide for freedom of movement within the country, foreign travel, emigration, and repatriation, and the government generally respected these rights in practice.

#### *Hearing*

42. The applicant appeared before the Tribunal [in] June 2010 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Serbian and English languages.

43. The applicant was represented in relation to the review by her registered migration agent who was present at the hearing.
44. The applicant's daughter was present to give evidence.
45. The Tribunal confirmed with the applicant that she understood the interpreter. The Tribunal also confirmed that she could hear adequately, as she had indicated that she had difficulties with her hearing on one side (the interpreter sat on the side where her hearing was adequate).
46. The applicant confirmed that she was born in [year deleted: s.431(2)] in [Village A], Serbia. She said [Village A] is a small village in the central west of Serbia. She lived there until she got married, then she moved to a different village called [name deleted: s.431(2)] in 1964. She lived there until she came to Australia.
47. She was asked what she fears if she returns. She said that her husband died in 1992. He was murdered by his father. She remained in Serbia for another 6 years after his death. After her husband died, her son left his job and all he does now is ask for money. She said her son threatened to kill her by throwing her in a well. She said there was an occasion when he held her by the throat and threatened to kill her. The applicant said her daughter cannot send her money every day. The applicant said that is why she cannot return. She fears being killed. She said her son is an alcoholic and drinks every day.
48. The applicant said her daughter returned to Serbia four years ago, to see if she could sort things out around the house, and she found that her brother had sold nearly all the contents of the house.
49. The applicant was asked why she her son wants to harm her. She said that he has left his job and all he does is ask for money, and drink. She said she has no money to give him.
50. She was asked to give the background to her son's condition. She said her son was drinking alcohol before her husband died, but after her husband died, he got worse. She said that when she asked her son why he left his job he said he did not want to work any more.
51. The applicant was asked if her son had been medically diagnosed with any condition. She said that he is nervous and not well. She said they do not have a telephone, and have nothing there. She said alcohol ruined his life.
52. The Tribunal asked her about the diagnosis of manic depression, which was mentioned in her submission to the Tribunal. She said he had been diagnosed. She was not sure if the diagnosis was established, she said they were preparing papers and it was refused. When asked what papers she was referring to, she said she meant the visa application. She was asked if her son has had medical treatment for his problems. She said she does not know now, but in the past he would be taken away for a few days by the police and taken to gaol, and then he would come back again.
53. The applicant confirmed that she arrived in Australia in 1998. She said she has a sister in Australia, and she came for her nephew's wedding.
54. The applicant was asked when her son threatened her. She said that the incidents when he threatened her took place before she came to Australia.

55. She was asked if she was in touch with him. She said for a year they were in touch. He did not go to the telephone that often. When she spoke to him, he would not talk much. She said that currently, he will not go to her brother-in-law's house when they call from Australia. The Tribunal asked if the brother-in-law was in contact with her son. She said her brother-in-law sees her son sitting outside the local shop, drinking.
56. She was asked whether her son had ever inflicted physical violence on her besides the incident where he put his hands around her throat. She said he threatens her when she does not give him money.
57. She was asked where her son was living now. She said that her son lives alone in the family, and is not working. She was asked who supports him. She said that he has sold all the family assets and survives on the proceeds. She commented that if he feels good, he might work casually.
58. She was asked if she felt that the threats made to her were empty threats or if her son had a serious intent to kill her. She said that she felt he could kill her. The Tribunal asked why he would want to kill her if he could not get money from her. She said that he does not think of that.
59. The Tribunal asked if he had been violent to anyone else. She said he had not. The Tribunal asked her, if he had not been violent to anyone else, why he would want to be violent towards his own mother. She said that it was because he demanded money. She claimed he said to her that he will go to prison and die.
60. The Tribunal put to her that she had been in Australia since 1998 and her son may no longer pose a threat. She said that her sister-in-law said that if the applicant returns to Serbia, her son will definitely kill her.
61. She was asked if she could move to another part of Serbia and avoid the risk of harm to her. She said that she has nowhere to go. She said if she was able to go she would go, but she could not support herself.
62. She was asked why if she arrived in Australia so long ago (1998) it took her all this time to apply for a protection visa. She was told that the fact that she waited so long may suggest to the Tribunal that she did not have a genuine fear of harm if she returned. She said that she had nowhere to go. She said that she applied once and got refused. She said her application might get refused again but she has nowhere to go.
63. She was asked if she agreed that there was a police force and criminal law system in Serbia. She said that there was an incident where he was picked up by the police for a couple of days.
64. She was asked why she could not ask the authorities for help if her son was threatening her. She said that if she reported her son to the police, and he is taken away, he will probably kill her when he is released by the police.
65. She was told that information before the Tribunal indicates that Serbia has taken reasonable measures to protect the lives and safety of its citizens including an appropriate criminal law and the provision of a reasonably effective and impartial police force and system of justice. She was asked if she wished to comment on why she would be unable to avail herself of this system. She said that as soon as her son returned home, he would kill her.



66. She handed up to the Tribunal a photograph of her son, showing him drinking and smoking, and with a ruddy complexion. She said this was what alcohol had done to him. She said that the photograph was taken two years ago when her granddaughter visited Serbia.
67. She was asked how her son acted with her granddaughter. She said that the granddaughter did not go to his house. She said he visited at the house where her granddaughter was staying.
68. The Tribunal explained that refugee law is based on the United Nations Convention, and the essential and significant reason for the harm feared must be race, religion, nationality, membership of a particular social group or political opinion. She was told that under refugee law, harm that is aimed at a person as an individual, (as was the situation in her case), will not bring a person within the Convention definition of a refugee unless the essential and significant reason for the harm feared was one of the Convention reasons. She was told this may be a reason for the Tribunal to affirm the decision of the Department. She was asked if she wished to comment. She said that she had nothing to add, she only applied to see if she could get the visa granted.

*[Ms A] (daughter of applicant)*

69. [Ms A] stated that she arrived in Australia in 1996.
70. She said that after her father's death in Serbia, her brother started drinking excessively. She said that he started harassing his mother, stopped working and asked her mother for money. She said that he would spend all his money on alcohol. She said that if he did not get money he threatened to throw her mother into the well.
71. [Ms A] was asked if the applicant behaved in this manner before she came to Australia in 1996. She said at that time he was drinking but still working. Then he stopped working and became addicted to alcohol.
72. She was asked if her brother had had any help with his alcoholism. She said that in her last visit, four years ago, she wanted him to seek medical help, but she was unable to force him to do so. She said that she went to a doctor with him. She said that the doctor indicated that her brother needed permanent medication, but her brother did not want to take the medication. She said that he did not want to seek help. He took tablets for two weeks but while they were sleeping, he sneaked out and drank. She said she stayed at her husband's family home and he stayed there for two weeks so they could try and help him. She was asked if he was ever violent. She said that he was not violent towards her, but she knew that if he drank he could be violent. She said her uncle told her that he had been robbing shops, and had been in trouble with the law. Recently he had been hallucinating and knocked on people's doors saying people were chasing him. In her last conversation with him he said he had a dream that his mother returned and he strangled her.
73. The Tribunal said that it appeared he had limited contact with her mother recently, and asked if she believed if her brother was capable of killing her mother. She said that she did not trust him. She said her brother said when her grandfather was released he would kill the grandfather.
74. She was asked about the manic depression. She said that her brother disturbed people and knocked on their doors and asked for money. She was asked if he had medical treatment for

his depression. She said he refuses and he does not have a medical card. He sold everything in his house and lost his personal documents.

*Adviser*

75. The adviser submitted that the applicant was in poor health, was elderly and would find it difficult to travel. He said she had no money, and fears her son. He requested that the Tribunal refer the matter to the Minister pursuant to section 417 of the *Migration Act*.

## **FINDINGS AND REASONS**

### **Nationality**

76. The Tribunal accepts on the basis of her passport that the applicant is a citizen of Serbia.

### **Claims**

77. The applicant claims to fear harm from her son, who she claims is a manic depressant and alcoholic. She claims he has threatened to kill her by throwing her in the well, and on one occasion put his hands around her neck. She claims to fear that he will kill her if she does not provide him money for alcohol.
78. She claimed that she did not think the authorities would be able to protect her, as once her son was released from gaol, he would return to kill her.

### **Convention nexus**

79. According to the Refugees Convention, the persecution which a person fears must be for one of the reasons enumerated in the Convention definition – race, religion, nationality, membership of a particular social group or political opinion.
80. The applicant fears harm from her son because he is mentally ill and alcoholic, and wishes to harm her because of her refusal to give him money, and his alcohol-induced propensity for violence. There is nothing in the evidence to indicate that the harm she fears is for any of the reasons enumerated in the Convention definition. The Tribunal is satisfied that the applicant is being targeted as an individual and because of her son's alcoholism and propensity for violence, and not for any Convention reason.
81. The Tribunal is not satisfied therefore that the applicant has a well-founded fear of persecution in the reasonably foreseeable future for one of the reasons enumerated in the Refugees Convention.

## **CONCLUSIONS**

82. 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**

83. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

## **MINISTERIAL INTERVENTION**

84. The applicant requested that the Tribunal refer the matter to the Minister pursuant to section 417.
85. The Tribunal considers that the case warrants being brought to the Minister's attention, given the unique and exceptional circumstances involved.
86. The following factor is relevant in assessing whether the case involves unique or exceptional circumstances: "compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person." The applicant is aged [age deleted: s.431(2)]. She suffers from diabetes, loss of hearing, high blood pressure and anxiety. She appears to be very reliant for all her needs, financial and psychological, on her daughter who is an Australian citizen. She lives with her daughter and grandchildren. She claims that she has no assets in Serbia and no-one to take care of her, (although there does appear to be some extended family there). She fears returning to Serbia because her son has threatened to kill her in the past. The Tribunal notes that she has been in Australia since 1998, and was unlawful from 2000.