

**0900037 [2009] RRTA 244 (27 February 2009)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0900037

**COUNTRY OF REFERENCE:** Montenegro

**TRIBUNAL MEMBER:** Adolfo Gentile

**DATE:** 27 February 2009

**PLACE OF DECISION:** Melbourne

**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 Montenegro, 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.
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 and the Tribunal's files relating to previous Protection Visa applications
20. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from a witness. The Tribunal hearing was conducted with the assistance of an interpreter in the Serbian and English languages.
21. The applicant's claims were outlined in his Protection Visa application form and were accurately summarised by the delegate as follows:

The applicant is a citizen of the FRY who states that he left FRY to join his wife in Australia. In relation to his fear of return to the FRY he states there is a lot of crime due to the change of government, he fears for his life as he supported the previous government and because of his former occupation. He states the current government is corrupt and unstable and even the president is accused of being a criminal. He fears harm at the hands of criminals and states he may be threatened, jailed or killed in the FRY.
22. At the Tribunal hearing the applicant was asked to specify, since this was not clear in his application, what country he was afraid to return to and concerning which he had claimed fear of persecution. He replied that it was Montenegro. This is the country where he was born and which, in June 2006, separated from the Union of Serbia and Montenegro to become a country in its own right following a referendum on the matter.
23. The applicant had last been in Montenegro for about two or three months in 2000s, after which he had lived in Country A until he returned to Australia.
24. Asked to state what he feared upon return to Montenegro, he stated that because he worked in the law enforcement area up to 1990s he had made some arrests and these were now people who were in powerful positions in a corrupt regime which he believes Montenegro is. He stated that he was pro-Serbian and against the separation of Serbia and Montenegro.
25. The applicant was asked to indicate to the Tribunal any harm which he had suffered, especially in the latter part of 2000s when he was in Montenegro. He stated that he was told that at his wedding he could not proceed with the traditional firing of weapons in the air in celebration. He had a Serbian flag flying over his house (he also pointed out that this was before separation of the two countries). He then described an incident in the 1990s when he went to the aid of a friend who had been hit by a policeman. He stated that people have been coming to his father's house asking about when he will be returning home. When asked why this would occur, the applicant stated that it is because he was opposed to separation. When asked why he had not mentioned the issue of his pro-Serbian stance before in his claims he stated that he had not thought of it. He stated that he would have no protection because corrupt people are in power.
26. The Tribunal discussed with the applicant his former career as a policeman when he finished his compulsory military service. He said that as a border control policeman he saw a lot of

smuggling of goods and drugs by criminals. Asked in what circumstances did he leave his work as a policeman, the applicant stated first that he had just left and gone to Hungary; later he clarified that he handed in his weapon and stated that he was ill: in the final analysis he stated that there are no consequences for him as a result of the manner in which he left the service of the police.

27. The Tribunal discussed with the applicant his situation regarding his right to enter and reside in Serbia and he stated that he would have the right to enter but in order to reside there he would need to engage in some administrative process. He has a valid Federal Republic of Yugoslavia passport which he obtained from the Sydney Consulate in 2000s.
28. The applicant provided the Tribunal with two articles with their partial translation from the Australian Serbian newspaper *Vesti*. The first is titled "Civil and political liberties have been breached in Montenegro", the second article's title has not been translated but it concerns an interview with the outgoing Italian ambassador to Montenegro who encourages people to express their opinions as part of the political process. The third translation is of a statement by the applicant (the statement itself has not been provided) in which he reports the killing of a newspaper proprietor and journalist, Dusko Jovanovic and the killing of the detective who was in charge of the investigation into the above murder.
29. The Tribunal heard from a friend of the applicant who essentially gave a glowing character reference for the applicant whom he had known for three or four years and whom he had helped on occasions.

## **FINDINGS AND REASONS**

### ***Background***

30. The applicant is a male who first arrived in Australia as a visitor. He made several applications for Protection Visas which were unsuccessful. The applicant departed Australia. The applicant married in the FRY. He returned to Australia on a particular class of visa. This application for Protection visa was submitted on a specified date.

### ***The applicant's nationality***

31. The applicant is in possession of a passport issued in city A by the Federal Republic of Yugoslavia. This passport is valid until a specified date. As a result of a referendum the Union of Serbia and Montenegro was dissolved and Montenegro became a self-governing country on 3 June 2006 (BBC News Country Profile Montenegro – [http://news.bbc.co.uk/2/hi/europe/country\\_profiles/5033274.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/5033274.stm) - accessed 17 February 2009).
32. The applicant was born in city B, Montenegro; the place of residence indicated in his FRY passport is city C, also in Montenegro. Apart from brief periods before he came to Australia the first time, the applicant has lived and worked in the territory which is now the Republic of Montenegro.
33. Given the above information, the Tribunal finds that for the purposes of Art. 1A(2) of the Convention, the applicant is a national of the Republic of Montenegro and will consider the claims against that country.

### *The applicant's claims*

34. The essence of the applicant's claims is that he fears persecution for reasons of his political opinion, because he did not support the separation of Serbia and Montenegro; he also fears retribution by persons whom he dealt with in his employment who are now in powerful positions. Earlier he had claimed fear of harm from criminals, fear of harm from the current government, which he feels is corrupt, and fear of harm from crime arising out of a change of government.
35. The applicant's evidence in relation to his fears consisted in indicating that the current regime in Montenegro is corrupt and that some people who were criminals are now in positions of power. He cited the names of two persons whom he had dealt with in his employment who are now in powerful positions.
36. Since he had returned to Montenegro, he was asked about the kinds of detriment he had experienced during his most recent stay there. He gave the example of laborious customs and entry procedures, the police coming to his place and telling him not to fire into the air as is customary for his wedding ceremony and that they would jail him if he did. These detriments do not constitute persecution in terms of the Convention.
37. He also provided the excerpts from newspaper articles cited above which are comments on the level of corruption and of one particular case of the killing of a policeman who was investigating the murder of a journalist. The applicant spent several months at his family home in Montenegro and returned there before he came back to Australia most recently. He did not report any harm of any kind done to him during this period. He stated at the hearing that persons have gone to his house asking when he will return but he provided no details of the reasons why people want to know when he is returning or who the people are who are asking for him.
38. The applicant left his former employment several years ago and has only returned to Montenegro since then for relatively short periods. The Tribunal accepts the theoretical possibility that some person could seek retribution. The applicant has not provided any evidence of particular people who would want to harm him, nor that anyone sought to do so during his last visit there, irrespective of the fact that this visit was before the separation of Serbia and Montenegro. His fear has been expressed in general terms in relation to the power that these persons would have acquired now. The example of the murder of a journalist and the policeman who was investigating his murder does not, of itself, go to supporting the applicant's argument that he too would be harmed. The situation he finds himself in is one which is considerably different because of the passage of time and the applicant has not advanced even suppositions as to who might be the criminal who wishes to harm him for reasons of his doing his job in the past. The Tribunal considers that the applicant is expressing a subjective fear, however, given the passage of time together with the vague nature of the threat as expressed by the applicant, the Tribunal finds that the chance of his being harmed for having arrested someone prior to 1995 is remote and insubstantial. The Tribunal accepts that corruption exists in the government as is attested by the material provided by the applicant; however, no precise connection between this corruption and his fear of future harm has been made by the applicant. The Tribunal finds these claims vague and lacking in detail and does not accept that the applicant faces a real chance of serious harm from criminals, the current government or because there has been a change of government or because of his previous work.

39. There is no indication from independent sources of any animosity or displays of animosity towards those who voted not to separate from Serbia in the May 2006 referendum. The U.S. Department of State Country Reports on Human Rights Practices, 2007, for Montenegro, issued by the Bureau of Democracy, Human Rights, and Labor on March 11, 2008, as an example amongst available independent information, does not report any instances of harm or even mention the issue of those who supported Serbia in the referendum; in addition, in the same report, under the heading 'Treatment of Minorities', the prominent example is the Roma minority and not any person from any former republic of Yugoslavia.
40. In light of the foregoing the Tribunal finds that there is not a real chance that the applicant would be subject to harm of the kind and severity amounting to persecution for reason of his imputed or actual political opinion, should he return to Montenegro.
41. Following from the evidence and discussion above, the Tribunal finds that there is not a real chance that the applicant would be persecuted for reasons of his political opinion or any other Convention reason, now or in the reasonably foreseeable future should he return to Montenegro, thus his fear of persecution is not well-founded .

## **CONCLUSIONS**

42. 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**

43. 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.: R. Lampugnani