

0802865 [2008] RRTA 307 (20 August 2008)

DECISION RECORD

RRT CASE NUMBER: 0802865

DIAC REFERENCE(S): CLF2008/45198

COUNTRY OF REFERENCE: Palestinian Territories (W.Bank/Gaza)

TRIBUNAL MEMBER: Shahyar Roushan

DATE DECISION SIGNED: 20 August 2008

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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 Palestinian Territories (W.Bank/Gaza), 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.
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 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. 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. The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Standard) and English languages.
21. The applicant was represented in relation to the review by his registered migration agent.

Application for a Protection Visa

22. According to his application for a protection visa, the applicant was born in Palestine. He travelled to Australia legally on a passport issued to him by the Palestinian Authority. He has completed more than a decade of education and describes his profession prior to his departure as "tradesperson". He worked as a tradesperson in the few years preceding his departure and before that he was unemployed. He lived at the same address in Camp A from the late 1990's until he came to Australia.
23. In a statement attached to his application form, the applicant claims that in the mid 1990's, he started working for the Committee Services of Camp A, which was under the control of the UN. He carried out all sorts of tasks relating to construction and cleaning. He stopped working in the early 2000's due to the state of emergency and the curfew imposed on the camp. In the mid 2000's he started working again for a contractor in the camp. He finished his job shortly before coming to Australia after getting married to Relative A. After arriving in Australia, he began encountering marital problems and was subjected to violence and threats of violence by his wife and members of her family.
24. The applicant claims that he cannot go back to Palestine because of "the state of the war there". He does not wish to hold arms in a war where innocent people are killed. There is even a war amongst Palestinians themselves and his relative died. His area is subjected to "constant random bombardment" because armed people cause problems in the area and then run away. He claims that he would not be able to relocate to another camp because he will be forced to join "the militias" and fight against Israel. He cannot go back to Camp A because of the unstable situation and the random bombardment.
25. In support of his application, the applicant submitted a number of news items relating to events relating to Gaza.

Application for Review

26. In a submission provided in support of the application for review, the applicant stated that he could not continue his studies due to “hardship, siege conditions and the war in Palestine”. They received food from the United Nations in cans, they could not own land and he could not find work because of the security wall built by Israel on the border. Also, different armed Palestinian groups and militias killed and kidnapped each others’ members. He does not have work or the freedom to move in the streets because of the military barriers separating suburbs, cities and families. People require magnetic passes in order to be able to cross barriers. Only married people aged 35 and over with children were issued with these passes.
27. The applicant stated that he did not participate in any military activities because he refused to fight with anyone. He was pressured by armed militias to join them, but he refused to fight against Israel because he believed in peace. He cannot go back to his country because he will face persecution, kidnapping, detention and death because he “did not agree with the Palestinian military organisations to fight against Israel” and to do what they wanted him to do. They considered him a traitor and the punishment would be death. He does not want to fight against Israel, but if he were to refuse he would be persecuted.
28. The submission included a number items extracted from a “community website” (Information relating to the community website deleted in accordance with s431 of the Migration Act as this information could identify the applicant).

The Hearing

29. The applicant stated that he met Relative A, an Australian citizen, in the mid 2000’s at a wedding and they decided to get married. As Relative A refused to live in Palestine, she sponsored him to come to Australia He obtained his passport in the mid 2000’s and arrived in Australia a few years later. Their relationship deteriorated soon after and the marital arrangement faltered.
30. In explaining his circumstances in Palestine, the applicant stated that he lived in Camp A from birth until his departure. He shared a house with his parents and several siblings, some of whom are married and have families of their own. Apart from some who live in Australia, the remainder of his siblings all live in Camp A The applicant stated that his father is currently unemployed and relies on a pension he receives from the UN, which also provides the family with food aid.
31. The applicant completed some school education, but did not go on to finish his secondary studies because his family was unable to afford it and he had to financially support his family by working.
32. In the mid 1990’s the applicant began participating in an employment program designed by the United Nations to assist the unemployed in Camp A Under the program he was given the opportunity to work a few months a year. For the remainder of the year, he was either unemployed or worked a few days a month as a tradesperson for a friend. This arrangement continued until the early 2000’s, when the United Nations put a temporary stop to the program. The applicant, however, continued to work for friends a few days a month. In the early 2000’s, Camp A was placed under curfew and the

applicant was unable to work. In the mid 2000's, he resumed working for his friends on the same basis as before. However, conditions of participation in the United Nations' employment program had changed, in that every year only one member of each family could participate. In order for his family members to participate, the applicant was no longer able to work a few months a year for the United Nations. The applicant was able to earn his own pocket money through his work.

33. The Tribunal asked him why he did not want to return to Palestine. He said militia men will force him to bear arms against Israel and if he refuses he will be killed. He said before coming to Australia he was approached by the militias, but he always made excuses, such as his father or mother being sick. He was asked on how many occasions he was approached by the militias. He said many times. He was asked when exactly he was approached. He said it started in the mid 2000's. He was asked who approached him. He said he did not know as they always covered their faces. The applicant referred to an article sourced from (Information relating to the community website deleted in accordance with s431 of the Migration Act as this information could identify the applicant) and stated that his neighbour, a young man, was approached a number of times and when he refused to join the militias, he was threatened. When his neighbour took up arms, he was killed by the Israelis. The Tribunal put to him that the article only referred to his neighbour associating with friends, some of whom were fighters, and that there was no mention of him being threatened or forced to have become a fighter. The applicant said the article would not mention the threats. The Israeli's had searched his neighbour's house a number of times and his neighbour refused to hand himself over to the Israelis.
34. The applicant was asked why the militias targeted *him*. He said because these people tried to take advantage of young people for their own benefit. He was asked why his siblings had not been approached. He said they had approached one sibling, but the Israelis arrested him and he was detained for a few years.
35. The Tribunal put to him that the independent sources consulted by the Tribunal do not suggest that political movements or militant organisations in the West Bank are engaged in forced recruitment or related tactics. The applicant stated that these groups or organisations operate secretly and do not reveal their programs. He added that he did not want to take up weapons because he will be killed.
36. He was asked why he was not approached before the mid 2000's. He said because in the late 1980's, the situation deteriorated and the Israelis were apprehending people all the time. When Hamas won the elections in Gaza, these organisations started to pressure people to join up. This kind of activity was conducted secretly and those involved did not wish to take any responsibility if anything were to happen to the persons recruited.
37. The Tribunal asked him about restrictions on his freedom of movement. The applicant stated that in order to leave Camp A he needed a magnetic ID card. He was unable to get the card because it is not issued to Palestinians between 18 and 35 years of age and without a family. This meant that he was geographically confined to Camp A and unable to leave. However, due to his economic conditions, he tried to leave in order to find work outside of the camp, which meant that he had to cross checkpoints set up by the Israelis. On many occasions in the mid 2000's, as he was unable to produce an ID card, he was detained for many hours at the checkpoints. He was asked, if he knew he was going to be detained, why he reapproached the checkpoints. He said he did not

have a choice as he needed to look for work. He was asked how he was able to obtain his visa and leave the camp to come to Australia. He said he was sponsored by a relative. He sent his passport by mail to the appropriate Australian Embassy where it was stamped with the visa. In order to leave the camp, he approached the relevant checkpoint and showed the soldiers his visa and they allowed him to pass through. He said if he were to return he will be subjected to ill treatment at checkpoints due to his age and marital status.

38. The Tribunal asked him if anything else happened to him. He said in the early 2000's the Israelis detained the residents of Camp A and ordered everyone into a military site where they were kept for a few days. He added later, the Israelis partially destroyed his house while looking for Palestinian fighters. The applicant and his family had to subsequently seek the UN's assistance in order to rebuild their house.
39. The applicant stated that his father is responsible for supporting the family financially through his pension. His family lives under difficult financial circumstances and is often unable to pay for water and electricity, which leads to frequent disruptions to these services until accounts are settled. The camp provides access to a GP and a dentist, but in case of medical emergencies, patients have to apply to the UN to approach the Israeli authorities for a permit which would allow those in need of urgent medical care to leave the camp in order to seek medical treatment in a hospital.

FINDINGS AND REASONS

40. The applicant's case is based on the convention grounds of imputed political opinion, race and membership of a particular social group. He claims to have been approached by unidentified militant organisations in Camp A and put under pressure to bear arms against Israel. He also claims to have been essentially confined to Camp A due to the severe restrictions placed on the movement of Palestinians under the age of 35.
41. The applicant travelled to Australia on his Palestinian Authority issued passport, which he produced at the Tribunal hearing. The Tribunal accepts that the applicant is a Palestinian born in the Palestinian Territories and that prior to his arrival in Australia he was a resident of the Palestinian Territories. The Tribunal finds that the applicant's country of reference and his country of former habitual residence are the Palestinian Territories.
42. As a preliminary matter, based on the evidence before it, the Tribunal finds that the applicant does not fall within the terms of the first paragraph of Article 1D and is not excluded from the operation of the Convention under Article 1D.
43. The Tribunal has considerable doubts about the applicant's claims of having been pressured by militants within Camp A to join their ranks. The Tribunal's doubts are based on the unconvincing nature of the applicant's evidence in support of this claim at the Tribunal hearing and its inconsistency with the independent evidence before the Tribunal.
44. In response to the Tribunal's questions as to who he was approached by and on how many occasions, the applicant was vague and unable to provide any meaningful information as to the identity of the individuals who had approached him or their organisational affiliation. The applicant reasoned that he did not know who had

approached him, because they had covered their faces. There is nothing odd in the fact that militants operating within camps in the Occupied Territories cover their faces. However, it would be reasonable to expect those engaged in wooing supporters or recruiting fighters to disclose their cause, ideological orientation or organisational affiliation to the ones they try to recruit to fight along their side. The applicant's inability to provide any information on the militants he claims to have approached him on numerous occasions cast doubt on whether he was in fact a target of forced recruitment by militants within Camp A.

45. In addition, the Tribunal has found no information in the sources it has consulted to point to the practice of forced recruitment by Hamas or Fatah, or any other organisation in the West Bank. The absence of any evidence to support the applicant's claims in this regard was reflected in a recent research response prepared by the Immigration and Refugee Board of Canada (Immigration and Refugee Board of Canada 2008, *PSE102762.E – Palestinian Territory: Occupied: Forced recruitment by Hamas, Fatah or any other organization in the West Bank; in particular whether forced recruitment by these groups occurs in universities; the consequences for individuals who refuse to join these groups*, 15 February, Immigration and Refugee Board of Canada website. The article submitted by the applicant in relation to his neighbour's death did not support the claim that he was in any way forcefully recruited or acted under duress. For these reasons, the Tribunal is not satisfied that the applicant was forced or pressured to join any militant armed group.
46. Notwithstanding the above finding, living in Camp A poses other hazards, which the Tribunal has considered carefully.
47. It would be an understatement to describe the living conditions of Palestinians residing in the Occupied Territories, particularly in or around City A where Camp A is located, as harsh. Camp A, which has been described as "a cramped suburb of [City A]" (Information relating to Camp A deleted in accordance with s431 of the Migration Act as this information could identify the applicant).
48. As a significant hub of resistance activity during the late 1980's to now, Camp A has been the site of frequent and significant military operations by the Israeli Defence Forces (Information relating to Camp A deleted in accordance with s431 of the Migration Act as this information could identify the applicant). These operations have resulted in a large number of civilian casualties and damage to property. The sources consulted refer extensively to house demolitions - either as a punitive measure or military manoeuvres designed to "re-organise the urban syntax"; and the use of Palestinian civilians as human shields (Information relating to Camp A deleted in accordance with s431 of the Migration Act as this information could identify the applicant). For instance, the Special Rapporteur on the promotion and protection of human rights has reported on the use of Palestinian civilians as human shields by the Israeli Defense Forces (IDF) in Camp A:

(Information relating to Camp A deleted in accordance with s431 of the Migration Act as this information could identify the applicant).

The independent information before the Tribunal indicates that the Israeli authorities in search of or in retaliation for rebellious action by Palestinian militants have increasingly extended their punitive activities against militants to include the

Palestinians population generally. Camp A residents appear to have been a prominent target of punishment directed against Palestinians collectively. Although Israel has steadfastly justified its actions on security grounds, human rights organisations are of the view that the actions of the Israeli authorities in the Occupied Territories are in excess of security requirements (Human Rights Watch, World Report 2003, 2004, 2005 and 2008, Israel, the Occupied West Bank and Gaza Strip, and Palestinian Authority Territories). The applicant's own encounters with the IDF, including the partial destruction of his house, exemplify the collective punishment directed towards civilians by the Israeli authorities in search of security. On the basis of the evidence before it, the Tribunal cannot rule out the possibility of the applicant being seriously mistreated by the Israeli forces in the Occupied Territories, particularly Camp A. The Tribunal is satisfied that this mistreatment would be directed towards the applicant for the reason of his ethnicity as a Palestinian.

49. In addition, socio-economic conditions in Camp A are poor and marked by a high population density, cramped living conditions and inadequate basic infrastructure such as roads and sewers. The UN provides the camp's residents with essential food and basic medical aid; and administers its installations. Access in and out of City A is essential for the delivery of food and medicine to the refugee population of Camp A and their ability to reach important medical facilities in City A. However, at times, movement within Camp A and City A may be restricted or prevented by curfews, IDF operations and mobile checkpoints. On occasions the camp has been completely sealed off, and that deliveries of food and medicine had been denied access to the camp (Information relating to Camp A deleted in accordance with s431 of the Migration Act as this information could identify the applicant).
50. These movement restrictions gripping Camp A are augmented by restrictions imposed on movements in and out of City A. (Information relating to Camp A deleted in accordance with s431 of the Migration Act as this information could identify the applicant).
51. B'Tselem has reported that the City A area has been under siege for several years and entry and exit is possible only via a few checkpoints that surround it.

(Information relating to Camp A deleted in accordance with s431 of the Migration Act as this information could identify the applicant).
52. In OCHA's view, it is impossible for the economy of City A to function normally under these conditions, as evidenced by the significant increase in unemployment in City A between the late 1990's and the mid 2000's. These conditions enhance the desperate economic situation of Camp A residents. It is, therefore, not surprising that young people, like the applicant, are forced to venture out of the camp and out of City A in search of work, only to be prevented from doing so by the Israeli security forces.
53. City A is strictly controlled by the IDF closure regime with bans imposed on the movement of males between the ages of 16 and 35, preventing them from entering or exiting City A. A report by B'Tselem details the practice of Israeli security forces of imposing periodic prohibitions on the movement in and out of City A of males (and in some cases females) between the age of 15 and 35:

(Information relating to Camp A deleted in accordance with s431 of the Migration Act as this information could identify the applicant).

54. According to B'Tselem, permits to cross the siege are not issued for “ordinary” needs, such as work, family visits, or studies, but only for needs that the authorities consider “humanitarian,” such as medical care. The waiting time is generally very long and includes many delays caused by the soldiers. At checkpoints, Palestinians are often subjected to degrading inspection procedures, detention and physical violence. In many cases Palestinians are detained for “security checks”, but soldiers often detain them as punishment or to “educate”.
55. The above evidence is entirely consistent with the applicant’s oral evidence that he was unable to cross checkpoints in search of work; and that on many occasions he was detained for many hours at Israeli checkpoints. The Tribunal is satisfied that the applicant was subjected to serious harm through the severe restrictions imposed on his movements, which essentially confined him to a small geographical area and potentially denied him access to services and the capacity to earn a livelihood. The Tribunal is satisfied that the applicant’s experiences at Israeli checkpoints amounted to persecution within the meaning of the Convention. There is no evidence before the Tribunal to suggest that the security measures employed by the Israelis has eased or will ease in the reasonably foreseeable future. The Tribunal is satisfied that there is a real chance that the applicant’s movements would continue to be severely restricted if he were to return to the Occupied Territories. The Tribunal is satisfied that these restrictions would cause the applicant significant economic hardship that threaten his capacity to subsist. The Tribunal is satisfied that the restrictions would deny the applicant access to basic services and the capacity to earn a livelihood. In both cases the Tribunal is satisfied that the denial would threaten the applicant’s capacity to subsist. The Tribunal is satisfied that if the applicant were to attempt to cross any Israeli checkpoint in search of a livelihood, there is a real chance that he would face significant physical harassment or significant ill-treatment. The Tribunal considers this treatment to amount to “serious harm” as required by paragraph 91R(1)(b) of the Act.
56. The country information referred to above clearly indicates, and the Tribunal accepts, that male Palestinians aged between 16 and 35 possess characteristics and attributes that make them distinguishable from the rest of the society and based on the prevailing social and cultural norms constitute a particular social group within the Convention meaning (see *Applicant S*, *ibid*). The Tribunal finds that that as a Palestinian male of a particular age, the applicant is a member of the particular social group of male Palestinians aged between 16 and 35.
57. The Tribunal is satisfied that the reason for the persecution in question is essentially and significantly the applicant’s Palestinian ethnicity and his membership of a particular social group. The Tribunal is satisfied that the applicant does not have adequate and effective state protection available to him. The Tribunal, therefore, is satisfied that the applicant has a well-founded fear of persecution for a Convention reason.
58. There was no evidence before the Tribunal to suggest that the applicant has a right to enter and reside in any country other than Jordan. The Tribunal finds that the applicant is not excluded from Australia’s protection by s.36(3) of the Act.

CONCLUSIONS

59. The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2)(a) for a protection visa.

DECISION

60. The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

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