

0903111 [2009] RRTA 631 (6 July 2009)

DECISION RECORD

RRT CASE NUMBER:	0903111
DIAC REFERENCE(S):	CLF2009/12434
COUNTRY OF REFERENCE:	Philippines
TRIBUNAL MEMBER:	Luke Hardy
DATE:	6 July 2009
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decisions not to grant the Applicants Protection (Class XA) visas.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the Applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The Applicants claim to be citizens of the Philippines. They applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] January 2009. The delegate decided to refuse to grant the visas [in] March 2009 and notified the Applicants of the decision and their review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the Applicants were not persons to whom Australia had protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] April 2009 for review of the delegate's decisions.
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 applicants have 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. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.
9. 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’

10. 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.
11. 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.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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.
15. 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.
16. 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.

17. 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.
18. 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.
19. 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

20. The Tribunal has before it the Department's file relating to the Applicants. 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.
21. The Applicant husband is the main Applicant in this case. The Applicant wife is listed in the primary protection visa application to the Department in effect as a dependent applicant, reliant on the claims of the Applicant husband.
22. The Tribunal invited both Applicants to speak at the hearing [in] July 2009 at which both gave evidence and presented arguments.
23. The Applicants are represented in relation to the review by a registered migration agent who did not attend the Tribunal hearing.
24. The Applicant husband came to Australia in 1986 and the Applicant wife came here in 1988. The Applicant husband told the Tribunal that he came here to help his working aunt care for his ailing grandmother. He told the Tribunal that he did not flee the Philippines for any Convention-related reason. He claimed his grandmother died five years later and that he and his wife remained here because he had a job (working illegally) and because his own sister had a child and needed help with the latter because she and her husband were both working. Again, he cited no Convention-related reasons for deciding to stay on after his grandmother died.
25. The Applicants raised two children in Australia who are Australian citizens and who are now 31 and 25 years old.
26. The Applicants claimed to the Department that they were afraid of returning to the Philippines because people who travel home after years abroad are known as *balikbayan* and popularly perceived to be relatively well-off, making them attractive targets for robbers and

kidnappers. They submitted a few news reports of individual attacks on *balikbayan* in recent times. They provided no evidence of such attacks on such persons being motivated by factors other than mercenary ones. In their own written and oral evidence, presented directly to the Tribunal, the Applicants said that this was more likely to happen in regional home areas where returning Filipinos and Filipinas have a local reputation and are envied for the wealth they may have acquired abroad.

27. The Applicant husband acknowledged at the hearing that criminal desire for money would be the essential and significant reason for a person trying to harm him upon return. He also seemed to argue that the chance of suffering such harm seemed quite remote: he acknowledged that tens of thousands of expatriate Filipinos and Filipinas return to the Philippines each week, and that the kind of people he feared might as easily target a seemingly well-off person who has not recently returned from abroad if that person was perceived to have money for the taking. He also said he was more afraid of a stroke of bad luck.
28. Ultimately, the Applicant husband said he is no longer advancing on his behalf or his wife's an application for recognition as a refugee under the Convention. His wife agreed with this position.
29. The Applicants asked that their request to remain in Australia be treated as a request for humanitarian consideration as they would suffer financial and emotional hardship if required to return to the Philippines. They also asked that the interests of their adult children be considered compassionately. They said they were aware through their adviser that such considerations are not within the jurisdiction of the Tribunal and are to be put to the Minister for non-compellable consideration under s.417 of the Act.

FINDINGS AND REASONS

30. The Tribunal accepts that the Applicants are nationals of the Philippines.
31. The Tribunal notes that the Applicants withdrew what they regarded as their refugee claims.
32. The Tribunal has considered these claims in any event and notes that the Applicants appeared to agree as to why these claims would not succeed.
33. Although the Tribunal accepts that *balikbayan* are a cognisable group on the Philippines, and although some individual *balikbayan* have been killed or harmed over the years in different places and circumstances, the Tribunal could find no evidence to suggest that they were being harmed essentially and significantly *for reason of* being *balikbayan*. The Applicants acknowledge that criminal desire for money leads criminals to target people who they think might be well-off, and that this could include people imputed to be *balikbayan* or just people who seem to be well-off.
34. The Tribunal could find no evidence to suggest that the authorities and the state actively or tacitly condone the targeting by criminals of people for their money.
35. The Applicant husband himself indicated that he does not apprehend a real chance of being harmed in the way described. The Tribunal could find no evidence to suggest that he or his wife face a real chance of being harmed in such ways.

36. In any event, the Applicants said at the hearing that they were no longer seeking to remain in Australia as refugees protected under the Convention but, rather, calling upon the Minister to exercise his non-binding discretion to grant them leave to remain for humanitarian reasons, their having few friends or relatives anywhere in the Philippines and having such strong family ties in Australia.
37. The Tribunal is not satisfied that the Applicants face a *real chance* of *Convention-related* persecution in the Philippines. Accordingly, the Tribunal finds that they do not have well founded fear of Convention-related persecution in the Philippines.

CONCLUSIONS

38. The Tribunal is not satisfied that the Applicants are persons to whom Australia has protection obligations under the Refugees Convention. Therefore the Applicants do not satisfy the criterion set out in s.36(2)(a) for a protection visa.

S.417 CLAIMS

39. The Tribunal refers these claims to the Minister with regard to s.417 of the Act.

DECISION

40. The Tribunal affirms the decisions not to grant the Applicants Protection (Class XA) visas.

<p>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 <i>Migration Act 1958</i>. Sealing Officer's I.D. RCHADW</p>
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