

071370063 [2007] RRTA 118 (27 June 2007)

DECISION RECORD

RRT CASE NUMBER: 071370063

DIAC REFERENCE(S): CLF2007/38024

COUNTRY OF REFERENCE: Lebanon

TRIBUNAL MEMBER: Sue Zelinka

DATE DECISION SIGNED: 27 June 2007

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

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).

The applicant, who claims to be a citizen of Lebanon, 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.

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.

The applicant applied to the Tribunal for review of the delegate's decision.

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.

The Tribunal held two hearings and gave an oral decision at the conclusion of the second hearing. The reasons are set out below.

RELEVANT LAW

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.

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 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).

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'

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.

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.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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

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.

To the Department

Information on the protection visa application (PVA) indicated that the applicant was from Lebanon. He gave his religion (question 12 of Part C of the PVA) as Jehovah's Witness. His claims were set out in a statutory declaration, as follows (lightly abridged):

5. I was baptised into the Jehovah's Witness faith in early 1990s. I was originally born into the Christian Orthodox faith.
6. I have been threatened on numerous occasions by my relatives and neighbours. During preaching activities I often encounter harassment and physical violence. As a Jehovah's Witness I am effectively treated as an outcast.
7. In the mid 1990s I suffered a jail term for refusing to complete compulsory military service. As a Jehovah's Witness I maintained an objection to serving in the military on the basis of my religious beliefs.
9. During my period of imprisonment I was severely mistreated by the authorities. I was constantly interrogated and was made to suffer sleep deprivation. On a number of occasions during interrogation sessions I was beaten and accused of being a Zionist. I was also deprived of food and water for days on end and exposed to sub zero temperatures.
9. On separate occasions I was hospitalised from the effects of the physical abuse.
10. Following my release from prison I was made to sign an undertaking that I would abide by weekly reporting conditions. These reporting conditions have continued to place unreasonable restrictions on my liberty and ability to practice my faith. Each time I would report to the authorities I would suffer further verbal abuse and threatened with further arrest if I am caught practicing my religion

11. As a Jehovah's Witness I am facing increasing community backlash against members of our faith. The Christian clergy rhetoric is mainly responsible for the increase in community violence towards the Jehovah's Witness. Relocating to another village or area is not a viable option because my family and I will face the same degree of hostility.

12. I am also persecuted by members of my own family including my relatives.

13. I remain deeply committed to my faith, however strict adherence is not possible given the requirement that I abide by strict reporting conditions and the increasing community hostility towards members of our faith. I continue to curtail core religious activities such as preaching and refraining from participating in religious meetings as a measure to guarantee my safety.

14. Practising my faith in a covert manner will only expose me to further risk of harm. I, like so many other members of my faith, find that the only viable option in guaranteeing our safety is to run altogether from practicing our faith.

13. I cannot rely on the authorities for protection in times when we I am attacked during preaching activities or when attending prayer group meetings. This makes my position particularly vulnerable. I also fear that if I proceeded to complain to the authorities they will carry out their threats of arresting me.

16. We are not officially recognised by our government as a religion. We are instead attributed with a political belief. Such lack of official state recognition has the effect of denying us the Constitutional right of freedom of worship which exists for other mainstream religions in Lebanon. Our religion is viewed not as a religion but as an extension of international Zionism in Lebanon.

To the Tribunal

The applicant appeared before the Tribunal on few occasions to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Arabic (Lebanese) and English languages.

The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.

I asked the applicant to explain what he meant in his statement that he was "originally from an Orthodox family". Did he mean that he had converted to the Jehovah's Witness' faith?

The applicant stated that his parents and other relatives were Jehovah's Witnesses: his statement merely indicated that originally – that is, in his grandparents' time – the family had been Orthodox. The applicant himself was born into the Jehovah's Witness faith and was raised within its teachings. His reference to his baptism at early age did not indicate any conversion, but to the fact that babies and children are not baptised as Jehovah's Witnesses, but are baptised only when they are old enough to make their own commitment to the faith. In the applicant's case, this occurred in early 1990s.

The applicant described his early life as a Jehovah's Witness. He noted that they constituted a small minority in their village and were isolated socially. Nor did the locals want to interact with them in business. They could be subjected to intimidation. The small Jehovah's Witness group looked after themselves, worshipping in private houses, changing houses from time to time. They made themselves inconspicuous: they did not proselytise; they did not advertise

their places of worship; they even kept their voices down when worshipping and did not sing. Despite these hardships, the applicant chose to follow in this faith and was baptised in the presence of other Jehovah's Witnesses, all of whom were related to him.

The applicant attended a secular public school. However, before he sought employment, he was required to do compulsory military service. Jehovah's Witnesses, as part of their faith, maintain a conscientious objection to military service. However, this was not accepted in Lebanon. The applicant duly reported to the army office and told his story, but it was not accepted. The military authorities sent him straight to a jail. He suffered extremely bad treatment, being denied food and sleep, he lost a great deal of weight, and was beaten unconscious. After several months, he was hospitalised, and then transferred to another jail for several more months. He was then sent to a camp, which he described as being worse than jail in some ways, for a number of months. After this, he was released and went home.

However, the detention was not finished. He was again summoned to do his military service and the cycle of refusal and jailing began again. In all, the applicant spent about two years in this sort of cycle, with much of that time being in detention. Before the military authorities had finally finished with the applicant, his relative – also a Jehovah's Witness – was called up for military service. He suffered the same treatment as the applicant. The applicant said that other relatives had to visit each of them in a different jail or camp, often at different ends of the country, during the period when their detentions overlapped.

The fact that the applicant had been jailed (albeit by the military) gave him a criminal record which in turn prevented him from gaining good employment, such as his education should have ensured. Instead, he spent his time assisting on the family farm or occasionally being able to get some work. This has resulted in the applicant being without a regular income and unable to accrue any assets. He said that was one of the reasons why he was still a single man at his age: his lack of funds hindered any ideas of courtship.

I asked the applicant about his visit to Australia. He said that his sibling had married an Australian citizen. Whose spouse was, in fact, a relative who had migrated to Australia many years ago. This person too is a Jehovah's Witness. Introductions between the two were made in the traditional way and they courted over the phone until the Australian relative returned to Lebanon and furthered his relationship with the applicant's sibling. The applicant was able to get a visa for Australia. The applicant noted that the wedding could not take place in Lebanon in the presence of all her family because Jehovah's Witness weddings are not recognised by the Lebanese state. Nor do they have secular weddings.

Since arriving in Australia, the applicant has marvelled at the freedom of worship allowed. He joined a congregation, an Arabic-speaking Jehovah's Witnesses group. The applicant submitted a letter from the officials of that church confirming that the applicant regularly attended church and participated in the other activities (like proselytizing). He also submitted the card he carried constantly with him (in case of accidents) noting that he is a Jehovah's Witness and therefore refuses to have blood transfusions.

I asked the applicant what he feared about returning to Lebanon, given that his account of life in his small Jehovah's Witness community seemed to emphasis discrimination and harassment, but perhaps not persecution (other than during his period of military service – or rather, non-service). The applicant said that he feared persecution again at the hands of the military authorities. He said that despite his failure to do military service, he had nevertheless been enrolled by the army as a member of the reserve forces. He submitted his army reserve

papers with accredited translation in support of this claim. He said that in the current climate in Lebanon, reserves were being called up. They had been called up before, but the army had luckily not reached his group before the particular crisis was over. However, his turn would come, and the cycle of refusal and detention and mistreatment would start again. The applicant noted that his relative was no longer at risk of further conscription because he had suffered an accident several years ago and now had a disability.

Furthermore, the applicant noted that any return to Lebanon would see the real curtailment (again) of his freedom to practise his faith, which will be even more difficult after his time in Australia when he has fully participated in all that is required by the church.

In conclusion, the applicant's adviser emphasised the real possibility of further military call-ups as the Lebanese Government battles against Islamist rebels, at a location – he notes – just a few kilometres from the applicant's home. The applicant added that his parents are severely stressed at the moment by the noise of shelling and explosions. They are constantly fearful. The applicant further noted that in these times of heightened religious tension, there was even more reason to fear as a Jehovah's Witness, a religion that is often misperceived in Lebanon as being associated with Zionism.

FINDINGS AND REASONS

On the basis of his passport, I find that the applicant is a citizen of Lebanon and assess his claims against that country.

I found the applicant to be a truthful witness. He has been consistent in his claims, and was able to explain or expand on any point which I asked about. I accept on his testimony and on the evidence that he presented that he is a devout and practising Jehovah's Witness and that he will continue to practise, albeit in a restricted way, if he were to return to Lebanon.

In accepting the applicant's testimony, I accept his claim that he suffered a period of severe mistreatment amounting to persecution during the mid 1990s. It is one thing for a state to have mandatory conscription, and some sort of approach to those who have a conscientious objection to military service, such as alternative service, or even a court case with a defined sentence. It is another thing to inflict severe mistreatment, amounting to persecution, on a conscientious objector, and to keep the process going in an undefined way. I am satisfied that this persecution was for reason of his religion.

I also accept the applicant's claim that he is subject to further call-ups: indeed, I have seen his army reserve card (on file). Lebanon is currently in a state of great tension: the central government is weak, religious factionalism is pronounced, and there are outbreaks of fighting with resultant civilian deaths and population movements. These have occupied much media time of late. Hence I accept that there is a real chance that the government will, at some point, call up the applicant from the reserve forces (where he is enlisted against his will). I accept that he will refuse military service again and that this will be perceived as a failure to uphold the government; and/or an adherence to a religious belief that is against the interests of Lebanon. I accept that the applicant will be severely mistreated as before.

I have noted the external evidence set out quite fully in the delegate's decision. Information from DFAT indicates that there is a "hostile attitude" towards Jehovah's Witnesses in Lebanon and confirms the applicant's claims that Jehovah's Witnesses cannot legally marry according to their faith in Lebanon (DFAT *CIR No. 06/17*, May 2006 at Cisnet CX153099).

The same decision also cites evidence that some Lebanese publications link the Jehovah's Witness faith to Zionism.

On the evidence before me, I find that the applicant has suffered serious harm amounting to persecution in the past, and that there is a real chance that the same harm will befall him again in the reasonably foreseeable future. The reason for this harm is the applicant's religious beliefs, which is a ground covered by the Convention. It follows that I am satisfied that the applicant has a well-founded fear of persecution for a Convention reason.

CONCLUSIONS

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) for a protection visa.

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.

<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. PMRTAK</p>
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