

060668202 [2006] RRTA 209 (29 November 2006)

DECISION RECORD

RRT CASE NUMBER: 060668202
DIMA REFERENCE(S): CLF2006/68050
COUNTRY OF REFERENCE: India
TRIBUNAL MEMBER: Samuel Blay
DATE DECISION SIGNED: 29 November 2006
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

This is an application for review of decisions made by a delegate of the Minister for Immigration and Multicultural Affairs to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

The applicants, who claim to be citizens of India, are husband and wife. They arrived in Australia and applied to the Department of Immigration and Multicultural Affairs for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.

The delegate refused the visa application on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention. They applied to the Tribunal for review of the delegate's decisions.

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.

Only the first named applicant has made claims under the Convention. No specific claims were made by or on behalf of his wife, the second named applicant. For convenience, the Tribunal will therefore refer to the applicants as 'the applicant'

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) of the Act relevantly provides that a criterion for a Protection (Class XA) visa is that the applicant for the visa is either:

- (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol

or

(b) a non-citizen in Australia who is the spouse or a dependent of a non-citizen (i) to whom Australia has protection obligations under the Refugees Convention and (ii) who holds a protection visa.

‘Refugees Convention’ and ‘Refugees Protocol’ are defined to mean the 1951 Convention Relating to the Status of Refugees and 1967 Protocol relating to the Status of Refugees respectively: s.5(1) of the Act. 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 the Refugees Protocol and generally speaking, has protection obligations to people who are refugees as defined in them. Article 1A(2) of the Convention 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 now 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 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.

DIMIA File

In a statement that accompanied his primary application, the applicant claimed that he was an active participant 'in ... religious activities' in his community in the city of Ahmedabad in the Indian state of Gujarat. He was also claimed active membership of a community organisation called Vishwa Hindu Parishad (VHP). [Information deleted: s431].

He claimed that Ahmedabad has 'some Muslim dominated areas and Hindu Muslim riots frequently take place'. He also claimed that 'other parts of Gujarat are relatively peaceful. He further claimed that in the early 2000s, there was communal violence between Hindus and Muslims following an attack in which more than a hundred people died. Few days after this incidence, his business was burnt and he and his partner were subject to threatening phone calls by 'unknown Muslim fundamentalists'. He claimed a caller 'said that the business burning was a revenge for the burning property and lives of Muslims'. He claimed that the VHP attempted unsuccessfully to obtain compensation for the burnt property from the government.

He and his partner opened a new business in a different suburb of Ahmedabad, but the threats to them and their business continued. He claimed he received 'threats several times a day from for few months in the mid 2000s'. Then, he decided to leave Ahmedabad and the Gujarat altogether. He left and returned after several months only faced with 'the same threats' as before.

The applicant further claimed that on a particular day, he was attacked on his way home from his business. He claimed he was 'beaten mercilessly' and 'left with a warning to leave Gujarat'. He said that he was warned that if he did not leave he would be killed. He claimed the police were not able to offer him any protection. In the circumstances, he and his wife decided to leave India. He concluded his statement by saying: 'We can be killed by Muslims or may even ...by power hungry Hindu fundamentalists. Indian police can never protect us'.

In another written statement submitted to the Tribunal, the applicant also claimed that 'there is no improvement in the law and order situation' in India and that people live in a 'fearful situation'. He argued that even though Hindus are in the majority in India, it does not mean that Hindus everywhere in India are protected by the ruling authorities.' He also claimed: 'we tried to relocate ourselves in other parts of India but we could not get success'

Oral testimony before the Tribunal

The applicant appeared before the Tribunal to give evidence and present arguments. After explaining the definition of the term 'refugee' as contained in the Convention to the applicant, the Tribunal commenced the hearing by inviting the applicant to explain why he did not wish or was unable to return to India. The Tribunal also invited him to advance any new information or evidence which he believed could assist his case or explain his claims better. The applicant spoke to his written statement and repeated the claims he had made in the statement.

He repeated his claims that he faces persecution from Muslim extremists. The Tribunal asked him to explain further. He said because 'they are strong in their attitude'. The Tribunal asked him to explain what he meant by 'they are strong in attitude'. He said they always issued warning against him and threatened him. The Tribunal asked why he thought the Muslims extremists picked on him. He said after his business was burnt they consistently targeted him.

The Tribunal asked the applicant if there was any other information he wished to add. He said the Muslim extremists were always warning him and he was not satisfied with the situation in India. The Tribunal asked him when he was last warned. He said it was several months ago. He claimed that he was told that if they met him again he will be killed. The Tribunal asked him again why he would have been targeted. He said the Hindus were always targeted 'us'. The Tribunal asked him to explain the 'us'. He said he was a member of the VHP that is why he was attacked. He said what he meant by 'us' is the VHP members. He repeated his claims.

The Tribunal asked the applicant about his educational background. He said he attended school for several years. After school he started working as an agent. He opened his own business in the late 1990s with a partner. He said that that business was only temporary. He started another business few years after his first business. The business closed after he left to come to Australia.

The Tribunal asked the applicant about the claim in his written statement that his business was burnt in the early 2000s. He repeated the claims that he went to the police station and lodged a complaint.

The Tribunal asked the applicant about his claims regarding threatening phone calls. The Tribunal asked him if he knew who had made the phone calls. He said it was the Muslims because he had a business in their area and he was a member of the VHP. The Tribunal asked him if he considered moving his business. He said he in fact moved his business to a Hindu area, but the threats continued. The Tribunal asked him if he reported the threats to the police. He said he reported the threats but the police did not act on them.

The Tribunal asked the applicant if he has siblings. He said he does and that they live in Gujarat. He said they are not members of the VHP.

The Tribunal asked the applicant if he has travelled outside India before. He said he had not but he has travelled outside the state of Gujarat before. He claimed he travelled to other states in India for work. He claimed he has travelled for instance to Maharashtra and the surrounding areas.

The Tribunal asked the applicant about his claims that he 'was beaten mercilessly' in mid 2000s. He repeated the claims in his written statement that he was attacked while on his way home. He subsequently reported the incident to the police, but they did not act on it. The Tribunal asked him how was able to get home and to report the incident to the police. He said he was assisted by people to go to the police station. After this incident he applied for a visa to come to Australia. He applied for his visa few weeks after the incident and he was granted a visa few weeks after that. He arrived in Australia within few months of the incident.

The Tribunal spoke to the applicant about relocation in India. The Tribunal asked him why he did not relocate to another part of India. He said in the political atmosphere it was not possible to establish his business. He said he did not feel comfortable to establish his business given the tensions in other parts of India. He claimed that in India the politicians and the police cannot help. The Tribunal asked him to explain himself further. He said the government never supported him and his wife. The Tribunal asked why he and wife could not do business like any other business persons in a city such as Mumbai or Madras. He said he did not have that much money to establish himself in a big city such as Mumbai. The Tribunal put it to him that is hardly persuasive because he has travelled all the way to come to Australia and if he could set himself

up in a foreign country why could he not do so in another city in India. He said he could not; that is why he has come to Australia.

The applicant said that he could provide insurance and related documents to show that he operated a business in India. He could also provide documents to show that his business was burnt and that he reported the incident to the police. He could also provide documents to show that he was a VHP member. The Tribunal indicated to the applicant that the documents are not critical because the Tribunal accepts that it is more probable than not that he was a member of the VHP and that he operated a business which could have been burnt during the riots. The Tribunal is also willing to accept that like any property owner he would have tried to lodge an insurance claim and a complaint with the police. The Tribunal then noted to him that the issue is whether he could relocate in another part of India. He said he could not relocate because he is very 'upset in his mind'.

When asked what he did in Australia, the applicant said that he lives in a town where there are other members of his family and that he works on a farm.

COUNTRY INFORMATION

[The information about the particular incident deleted in accordance with s431 as it may identify the applicant]

A wide range of reports, prepared by a number of international authorities including key human rights groups and the media, indicating the scene of some of the worst anti-Muslim violence in ten years.

FINDINGS AND REASONS

The central claim of the applicant is that he faces persecution at the hands of Muslim fundamentalists because he is a Hindu and because of his association with a Hindu community organisation. His claim is thus founded on fear of persecution on religious grounds and or membership of the Hindu community. To the extent that the Hindu community organisation may involve itself in social and political issues, it is also arguable that his claim is founded on his political opinion. For reasons that follow the Tribunal does not accept the basis of any of these claims.

The applicant's business activities and his membership in the VHP community organisation

The applicant claims that he operated a business that was burnt during the riots in the early 2000s. He indicated to the Tribunal that he could provide documents to show that he in fact operated a business in India and that he was a member of the VHP. He also told the Tribunal that he could provide insurance documents to prove that his business was destroyed and that he filed a complaint with the police and made an insurance claim. As the Tribunal indicated to the applicant in course of the hearing, to the extent that he wished to prove that he in fact operated a business which was attacked during the communal riots in Gujarat, the documents are not necessary. This is because it is common knowledge and the Tribunal accepts that there were riots. It is also common knowledge and the Tribunal accordingly finds that in the community riots, several businesses belonging to Hindus and Muslims alike were burnt. On the evidence, the Tribunal further finds that it is more probable than not that the applicant owned a business that was burnt during the communal strife in the state of Gujarat. As a businessman engaged in the business, it is highly plausible that the applicant could have been associated with a community organisation such as the VHP in Ahmedabad. The Tribunal therefore accepts and finds accordingly that it is more probable than not that the applicant was a member of the VHP in Ahmedabad.

Claims of persecution

The issue before the Tribunal however is whether there is a real as distinct from a remote chance that the applicant will face persecution for any Convention reason or reasons on his return to India. While the applicant's business may have been attacked during the communal riots, there is no credible evidence that the applicant was targeted for reason of his membership of a particular social group, his religion or his political opinion. As noted earlier, the attack occurred in the midst of community strife in the country. Even if one accepted that the applicant's business was targeted for any of the Convention reasons, this will not assist his case. This is because, these events occurred in early 2000s. There is no credible evidence before the Tribunal that since then the applicant has been subject to further persecution.

The Tribunal notes the applicant's claim that in the mid 2000s, he was dragged out and 'beaten mercilessly' by a group of Muslim assailants who warned him that when they meet him again they will kill him. He claims that he reported the matter to the police but they did not act on his complaints. The applicant did not provide any information or evidence to corroborate or

substantiate his claims. All that the Tribunal has are his bare claims. In the absence of any supporting information, the Tribunal doubts the veracity of the claims.

The benefit of doubt

The Tribunal is aware that situation of the asylum seeker is a peculiar and difficult one. In many instances an applicant for asylum may not be able to produce the required information to substantiate a claim. It is a situation which sometimes demands that the asylum applicant should be given the benefit of the doubt. Therefore in spite of the Tribunal's doubts about the veracity of his claims of being 'beaten mercilessly', the Tribunal is willing to give the applicant the benefit of the doubt and to accept that in the communal tensions of the Ahmedabad where he is well known, he may have been attacked by Muslim assailants.

Reasonable capacity for relocation

However, the Tribunal's acceptance that the applicant may have been attacked does not necessarily assist his case. This is because in the opinion of the Tribunal, the applicant is reasonably capable of relocating to other parts of India if indeed he faces persecution in his city of Ahmedabad.

The Refugee Convention is a humanitarian instrument. Its purpose is to provide international protection in circumstances where national protection is not available. An applicant for asylum is therefore not in need of international protection if protection is available in another part of his or her country of origin. As was noted by Black CJ in *Randhawa v MILGEA (Randhawa)*¹, the focus of the Convention is not upon the protection that the country of nationality might be able to provide in particular regions, but upon a more general notion of protection by the whole of the country. His Honour considered that the reason for this was that:

If it were otherwise, the anomalous situation would exist that the international community would be under an obligation to provide protection outside the borders of the country of nationality even though real protection could be found within those borders.²

¹ (1994) 52 FCR 437.

² (1994) 52 FCR 437 at 441.

In *Randhawa*, Black CJ also held that given the humanitarian aims of the Convention, the question to be asked is not merely whether an applicant could relocate to another area, but whether he or she could “reasonably be expected to do so”. His Honour stated:

... a person’s fear of persecution in relation to that country [of nationality] will remain well-founded with respect to the country as a whole if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person.³

Beaumont J agreed that relocation must be a reasonable option, stating:

... that is to say, if relocation is, in the particular circumstances, an unreasonable option, it should not be taken into account as an answer to a claim of persecution.⁴

The Tribunal does not see any impediment to the applicant’s relocation to other parts of India. At the hearing, the applicant claimed that after the attack on him in the mid 2000s, he decided to leave India. He applied for a visa to come to Australia and was granted a visa the same month. When asked why he had not relocated to Mumbai, Madras or another part of India, he said he did not feel comfortable setting up his business in other parts of India. The applicant did not give the Tribunal any persuasive reason as why he feels uncomfortable to set up his business in other parts of India. The Tribunal notes his claims that he believes that the politicians and the police will not protect him and his wife in other parts of India. As the Tribunal noted to him in the course of the hearing, there is no rational basis for the belief that he and his wife will not be entitled to the same protection as other business people in other major cities in India.

The Tribunal also notes the applicant’s claims that he does not have enough money to set up business in another city. As the Tribunal told the applicant at the hearing, this is hardly persuasive. The applicant seems to make his relocation to another city dependant on whether he can set up his own business. The Tribunal sees no reason for this. The applicant is currently employed in Australia in a town. He is also a skilled person. All this indicates that he is easily capable of taking up other types of work without the necessity to establish his own business.

In his written submissions, the applicant claimed that he has attempted relocation in the past but was unsuccessful. At the hearing, he was not able to tell the Tribunal where he had tried to relocate in the past. The Tribunal rejects the claim accordingly. The evidence suggests that he is reasonably capable of relocating within India.

³ *Randhawa v MILGEA* (1994) 52 FCR 437 at 442.

⁴ *ibid* at 451.

On the evidence before it, the Tribunal accordingly finds that while the applicant may have been the target of attacks in his city of Ahmedabad, he is capable of relocating to other parts of India. The Tribunal is accordingly not satisfied that the applicant has a well founded fear of persecution for a Convention reason if he returns to India.

CONCLUSIONS

Having considered the evidence as a whole, the Tribunal is not satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the first named applicant does not satisfy the criterion set out in s.36(2) for a protection visa.

No specific Convention claims were made by or on behalf of his wife the second named applicant. The fate of her application therefore depends on the outcome of her husband's application. As he cannot be granted a protection visa, it follows that his wife cannot satisfy the alternative criterion set out in s.36(2)(b) and cannot be granted a protection visa.

DECISION

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. PMRTAK</p>
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