

0805670 [2008] RRTA 451 (9 December 2008)

DECISION RECORD

RRT CASE NUMBER: 0805670
DIAC REFERENCE(S): CLF2008/87770
COUNTRY OF REFERENCE: India
TRIBUNAL MEMBER: Irene O'Connell
DATE: 9 December 2008
PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of India, 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 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.

RELEVANT LAW

4. 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.
5. 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).
6. 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'

7. 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.
8. 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.

9. 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.
10. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
11. 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.
12. 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.
13. 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.
14. 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.
15. 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.
16. 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

17. 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.
18. 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 Tamil and English languages.

Claims as set out in the protection visa application

19. The applicant states that he is a married man. He lists his ethnic group as Tamil and his religion as Hindu. He states that he speaks Tamil, English and Hindi. He states that he visited country A prior to coming to Australia. He lists a number of years of education and states that he has worked with the Indian Army and another occupation.
20. Attached to the protection visa application is a statement from the applicant. In the statement the applicant states that he enlisted in the Indian Army and he retired from the service. He states that after his retirement he started providing physical training in the area. He states that he was approached by some men who asked him to provide training in their area. He states that he agreed to accompany them for a short period to provide training and when he arrived he realised that the group were politically motivated [referred to in this publication version as Group A].
21. He states that they forced him to provide them with training and threatened to kill him if he did not do as required. He states that he provided training and that he contemplated escaping but he was fearful of being killed.
22. He states that the district 1 police raided the area and that he was able to escape and return to his own place. He states that however one of the men arrested by the police told the police about the applicant and provided details of his name, address and that the police then went looking for him. He states:

I faced dangerous threats from [district 2] terrorists, the [district 1] group A, the police and the governments of [various areas] If I am caught by any one of the above, I am sure that I will be killed. My family members think that I live somewhere and they are satisfied though they do not see me. My family members also do not like to live in India as they foresee the danger from any corner of the country.

Application for review

23. In providing his application for review the applicant submitted several documents to the Tribunal. These documents are as follows:
 - Several documents relating to the applicant's time of employment with the Indian Army, which include a certificate.
 - A certificate issued by the Indian Army in the name of the applicant. The document date is not readable.

- Photographs of the applicant in the Indian Army.
- A document titled providing details about the applicant indicating that he was in the army and that he retired.
- A certificate that contains reference to the applicant and his wife and children and a further certificate document which also refers to the applicant
- A further document referred to as a pension certificate copy.
- A document containing a photograph of the applicant and referring to the applicant as an ex-serviceman.
- An army discharge and recommendation for civil employment set out in Hindi and English.
- An Income Tax Certificate from the Government of India in reference to the applicant.
- An ex-serviceman's card in reference to the applicant.
- An ex-serviceman's identity card with reference to the applicant
- A character certificate issued by the Indian Army in respect to the applicant stating that the applicant has served in the Indian Army and that his conduct both military and personal is exemplary.
- A further certificate titled certifying that the applicant had taken part in an examination conducted by the army.
- A further certificate issued by the Indian Army with respect to the applicant.
- A birth certificate relevant to the applicant.
- An untranslated news article downloaded from the internet.

Claims as Stated at the Hearing

24. At the commencement of the hearing the applicant presented the following additional documents to the Tribunal:

- A photocopy of a First Information Report. This states:

My husband said he will return within a month from [district 1] but he didn't.

- A photocopy of a letter with the subject heading "[title]" and addressed to the Inspector of Police. This letter states in part:

My husband said that he will be back within a month. I didn't receive any call from my husband more than 2 months. I am scared about his life...

- A photocopy of a letter headed [title] and dated [date] This states in part that:

There is life threat for all of you which I received message from Army intelligence and they have advised that all of you should be alert and very careful. They have sent me the secret letter about this matter. This matter is true becuz, on [date], was somebody trying to kill [name]...

- A reference letter from the applicant's employer referring to his employment.
- Several photocopies of untranslated news articles several of which are also undated.

25. The hearing was conducted with the assistance of a Tamil interpreter. At the beginning of the hearing the Tribunal discussed with the applicant his language skills. The Tribunal noted that in his Protection visa application he had indicated that he speaks, reads and writes English. The Tribunal asked the applicant whether he understood English. The applicant stated that he did to some extent. The Tribunal noted that he had requested a Tamil interpreter and the Tribunal had a Tamil interpreter for the hearing and the hearing would be conducted through the interpreter. The applicant agreed to this.
26. The Tribunal noted that the applicant had provided untranslated news articles to the Tribunal and reminded the applicant of the need to provide to the Tribunal documentation in the English language that he wished the Tribunal to consider.
27. The Tribunal noted that the applicant had provided his passport to the Tribunal and asked if this was his first passport. The applicant stated that it was his first passport and it was issued to him in the early 2000s. He stated that he had acquired a visa in the mid 2000s to travel to country A but he had never made use of this visa. He stated that he decided not to travel to country A because he did not consider it safe and he did not think he could be provided with protection there.
28. The applicant stated that he tried on several occasions to come to Australia. The Tribunal asked the applicant about these occasions. The applicant stated that in the mid 2000s he had twice applied for a visa to Australia and again two years later He stated that his applications were rejected and that he received a visa to come to Australia the month prior to arriving in Australia.
29. The Tribunal asked the applicant why he had been trying to come to Australia since the mid 2000s The applicant referred to a letter he provided to the Tribunal at the commencement of the hearing from his commanding superior which he said indicated to him that his life was in danger from terrorists from the district 2 group. The applicant stated that after he received this letter from his commanding officer he felt that he needed to flee the country and seek protection in Australia.
30. The Tribunal asked the applicant when he received this letter. The applicant stated he received this letter in the mid 2000s. The Tribunal noted that the applicant had provided a copy to the Tribunal and asked the applicant if this was the original letter. The applicant stated that it was a photocopy of the original letter but he had the original letter at home. The Tribunal asked whether this was the translated or untranslated version. The applicant stated that the letter was written to him in the English language.

31. The Tribunal asked the applicant what measures he took in response to receiving this letter apart from attempting to leave the country and travel to Australia. The applicant stated that he was in the army and retired some years prior. He stated that it was a voluntary retirement. He stated that he started applying for a visa to Australia after receiving the letter from his commanding officer along with other members of his regiment warning him that his life was in danger from the district 2 terrorists.
32. The Tribunal asked the applicant what other measures he took to protect his life after receiving the advice from his commanding officer that his life was threatened over and above applying for a visa to come to Australia. The applicant stated that he went into hiding. The Tribunal noted that the applicant had stated that he had been in employment to the mid 2000s and had provided a letter to the Tribunal indicating this by way of a reference letter from his former employer. The applicant stated that he did work but he was also in hiding. The Tribunal indicated to the applicant that the Tribunal was confused as how he could both be working and also in hiding. The applicant stated that he used to come out of hiding and carry out his job but he also was in hiding. The applicant stated that he resigned from his job in the mid 2000s.
33. The Tribunal asked the applicant at what point in time he went into hiding. The applicant stated that he went into hiding two years before this, shortly after receiving the letter from his commanding officer about the threat to his life. The Tribunal again put to the applicant that the Tribunal had difficulty understanding how he could both be working full-time and at the same time be hiding. The applicant repeated that he resigned from his job. The applicant stated that although he had a visa to go to country A he had not attempted to take advantage of it because he understood he could not get protection in country A.
34. The Tribunal asked the applicant about events in the mid 2000s. The applicant stated that at this time some people approached him and they required him to provide training to their terrorist group. The applicant stated that he had been providing training to others and that they kidnapped him and required him to provide training to group A. The applicant stated that he was taken into the forest by the group A and that he agreed to give them training, however they made him stay for over a year and to provide training. The applicant stated that they threatened him that if he attempted to escape they would kill him and he was forced to provide training to them and he was told that if he did not agree to this he would be killed and so would his family.
35. The applicant stated that the following year the district 1 police carried out a raid on the camp and that as the police had a photograph of him with the group they suspected him to be one of them. He stated that group A all tried to escape and he also managed to escape when the police raided their headquarters but the police believed him to be a Group A member. The applicant stated that they informed the district 3 police and that the district 3 police and the district 1 police were searching for him and that he believed that if he was to return to India he would be killed by the police.
36. The Tribunal asked the applicant what type of training he had provided to the group A. The applicant stated that he had provided physical training. The Tribunal asked the applicant for further detail about this. The applicant stated that he provided training in the form of running, jumping, crawling along the ground. He stated that he provided physical training. The Tribunal asked the applicant whether he provided any other form of training. The applicant stated that he had not provided any other type of training.

37. The Tribunal stated that it had difficulty understanding why the police would assume him to be a member rather than assume him to be a victim of group A and captured by them, given that is what he is claiming to be his circumstance. The Tribunal put to the applicant that the applicant had provided to the Tribunal a police report in which his wife had provided evidence to the police that her husband had gone missing, as well as a letter that his wife had supposedly written to the police indicating that he had disappeared. The Tribunal put to the applicant that given the police were informed that the applicant had gone missing it would seem that the police would be more likely to believe that he was a victim and captured by group A rather than to assume that he was a member of the group. The applicant stated that because there was a photograph of him with group A the police believed that he was part of the group and would deal with him accordingly.
38. The Tribunal put to the applicant that given that he had many years of service in the Indian army and given that his wife had alerted the police to the fact that he had gone missing the Tribunal had difficulty accepting that the police would assume him to be part of group A rather than a victim of them. The applicant stated that he believed the group A would wish to kill him. The Tribunal asked the applicant why that would be the case. The applicant stated that they would try to kill him because he had escaped from them and that he had not given them training. The applicant stated that group A are all over India and he suspected because he had run away and escaped they would wish to kill him.
39. The Tribunal asked the applicant whether it was correct to say that he feared harm from the police because they suspected him to be a member of group A. He feared harm from group A because he escaped from them and he also feared harm from the district 2 terrorists because he had served in the Indian army. The applicant stated that this was correct.
40. The Tribunal asked the applicant whether there was anything else he wished to put to the Tribunal. The applicant stated that he did not have anything further to say but that he just needs his children and he is unable to see them and if he was to be returned to India he would be killed.
41. The Tribunal put to the applicant that the Tribunal had several concerns about his claimed fear of harm on return to India. The Tribunal put to the applicant that the Tribunal was not convinced about his claimed events. The Tribunal accepted that he had served in the Indian army and that thereafter he had been employed elsewhere. However, the Tribunal was unconvinced that he had been captured by the group A and forced to provide training. The Tribunal stated that it found it implausible that they would bother to capture somebody for over a year for the purposes of providing physical training in the form of exercises running and climbing.
42. The applicant stated that he provided another sort of training. The Tribunal asked what this other form of training was. The applicant stated that he was also forced to provide them with training on how to escape from the army. The Tribunal again repeated that the Tribunal considered it rather unusual that they would capture somebody to teach them escape techniques.
43. The Tribunal also put to the applicant that the Tribunal was not convinced about his claim that the police wished to harm him. The Tribunal put to the applicant that the Tribunal did not accept that he had been captured but even it did considered the Tribunal considered it implausible that the police would consider him to be a member of the group A in any event.

The applicant repeated that the police had seen a photograph of him with the group A and therefore would seek to kill him.

44. The Tribunal stated that given that the applicant had served in the Indian army for many years and his wife had supposedly complained about him being captured then it would be unlikely that the police would assume him to be a member of the group A.
45. The Tribunal put to the applicant that the Tribunal considered some of the documents he had provided to the Tribunal to be fabricated. The Tribunal indicated that there are number of features of these documents that the Tribunal was not convinced about.
46. In respect to the news article that he had provided, the Tribunal noted that this was merely a photocopied document and undated and could easily have been manufactured on a computer. The Tribunal also noted that the letter the applicant provided, supposedly a letter written to him from his commanding officer warning him and other members of his regiment that his life was in danger had that several features of this letter were unsatisfactory in that style of writing and the poor spelling did not seem to be that of a commanding officer. The Tribunal noted that the style of this letter was significantly different from the letter also provided to the Tribunal from his former employer stating that he had been a satisfactory worker. The Tribunal noted that this had been a well-presented and properly constructed letter whereas the letter the applicant presented supposedly from this commanding officer was in a manner and style that the Tribunal was not prepared to place weight on it as being in fact a letter from his commanding officer.
47. The Tribunal also discussed with the applicant the photocopy he had provided of the First Information Report and letter from his wife. The Tribunal noted that these documents simply indicated that the applicant's wife had informed the police that she believed that her husband was kidnapped. The Tribunal noted that there was no follow –up or independent verification of the complaint by his wife. The Tribunal also noted that the documents were poor photocopies but not originals.
48. The applicant stated that he could obtain originals from India which might take some six weeks. The Tribunal indicated the Tribunal would not wait six weeks before finalising its decision but that this did not preclude the applicant from providing documents to the Tribunal after the hearing.
49. The applicant referred to having marks on his body from attempting to escape from the group A. The Tribunal indicated to the applicant that it accepted that he may have marks on his body, but that as a person who had served in the army; these marks would not indicate or support his claim to have escaped but could be marks acquired in a number of ways.
50. The Tribunal also put to the applicant it considered that his claims to be in hiding out of fear of harm but at the same time he was working inconsistent and as such the Tribunal did not accept that the events had happened that he so claimed and that the applicant was in fear for his life before he left India.

FINDINGS AND REASONS

51. The applicant's claims may be summarised as follows. The applicant claims he faces harm from three distinct groups should he return to India. He fears harm from the district 2 terrorists by reason of a military operation he was involved in whilst serving in the Indian

Army. He fears harm from group A because he escaped from them and they threatened to kill him if he escaped. He fears harm from the Indian authorities as they suppose him to be a supporter of the group A. The Tribunal finds as follows.

52. On the basis of the applicant's passport presented at the hearing the Tribunal finds that the applicant is a citizen of India who arrived in Australia and who remains as a non-citizen.
53. On the basis of the original documents and photocopies of original documents such as the Military Service Card and pension payments the Tribunal accepts that the applicant served in the Indian Army and he voluntarily retired.
54. The Tribunal, however, has come to the conclusion that the applicant is not credible in respect of key aspects of his claims for protection. Not being satisfied in respect of these aspects of his claims, which are discussed below, leads the Tribunal to conclude that the applicant is not in genuine fear of persecution nor is there a real chance of persecution on his return to India.
55. The Tribunal does not accept that the applicant was in fear of harm in India from district 2 terrorists or is a target of the district 2 terrorists by reason of actions he undertook whilst serving in the Indian Army. The Tribunal found the applicant's oral evidence, in respect to his manner of conducting himself to avoid the harm he claims to be in fear of, to be inconsistent and unpersuasive.
56. The applicant claims to have received a letter of warning from his former Commanding Officer in respect to threats from district 2 terrorists. When asked what measures he took in response to receiving this letter, the applicant referred to unsuccessful applications he made to come to Australia. When pressed to explain what measures he took in India to protect himself from the harm he claimed to fear, he stated that he hid. When it was put to the applicant that a reference letter from his former employer indicated that he was working at this time the applicant claimed that he was both in hiding and working at the same time and that he would come out of hiding to go to work.
57. The Tribunal found the applicant's oral evidence in respect to threats from district 2 terrorists to be vague. He did not elaborate on threats to him or events of harm to him.
58. The Tribunal considers the letter purportedly written by the applicant's former Commanding Officer warning him of possible threats against him, to be fabricated. The Tribunal considers it implausible that the applicant's Commanding Officer of some years back would be writing to the applicant stating that he had secret information from Army Intelligence. As discussed with the applicant at the hearing the style, construction and content of this letter contrasts with other original documents provided by the applicant in respect to his period in the army. The letter is poorly constructed and not in keeping with style of those documents dealing with other aspects of the applicant's time in the Indian Army.
59. The Tribunal does not accept that group A will attempt to kill the applicant on his return to India Nor does the Tribunal accept that the Indian authorities will seek to harm the applicant on his return to India because they believe him to be a member of group A The Tribunal does not accept these claims because the Tribunal found the applicant's oral evidence about his claimed kidnapping to be unpersuasive. The applicant did not readily or naturally speak of his claimed period with group A. He only provided limited responses to questions asked When asked to explain why the group A would keep him in captivity for over a year the applicant

stated that they wanted him to train their men in things such as running, climbing ropes and jumping. When the Tribunal expressed some reservations about the notion of capturing a person for these purposes the applicant responded that he was also required to teach them escape techniques.

60. The applicant, at the hearing, provided to the Tribunal a photocopy of a First Information Report, which states that the applicant's wife had gone to the police to report her husband as missing and a letter which is said to be a copy of a letter written by the applicant's wife to the police stating that her husband is missing and possibly kidnapped. The Tribunal does not place weight on these documents as independent verification of the applicant's claims as they are statements by his wife to the effect that her husband is missing; there is no reply or correspondence from the police indicating receipt of these documents or actions taken in response.
61. The Tribunal does not accept that the Indian authorities consider the applicant to be an associate of the group A, as the Tribunal does not accept that the applicant spent over a year forcibly held in a training camp leading the police to impute him to be a member of group A.
62. Given the applicant's long service with the Indian Army the Tribunal considers it remote that the police would consider the applicant to be in collusion with the group A such that the police would wish to harm or kill the applicant on his return to India.
63. Accordingly, for the reasons set out above, the Tribunal is not satisfied that the applicant has a well- founded fear of persecution for a Convention reason on his return to India.

CONCLUSION

64. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

65. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

<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. PRDRSC</p>
--