Administrative
Appeals
Tribunal

DECISION AND REASONS FOR DECISION [2003] AATA 1250

ADMINISTRATIVE APPEALS TRIBUNAL	**)**	
	)	**No W2002/310**
GENERAL ADMINISTRATIVE DIVISION	**)**	

Re **"WBA"**

Applicant

And **MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS**

Respondent

DECISION

Tribunal Associate Professor S D Hotop, Deputy President

Date 11 December 2003

Place Perth

Decision The Tribunal affirms the decision under review.

.....(sgd S D Hotop).....
Deputy President

CATCHWORDS

IMMIGRATION AND CITIZENSHIP - protection visa - Article 1F of Refugees Convention - serious reasons for considering that applicant has committed serious non-political crime outside Australia - visa refused - decision under review affirmed

Extradition Act 1988 (Cth), s 5
Migration Act 1958 (Cth), s 5(1), s 29(1), s 31, s 36(1), s 36(2), s 65(1), s91T and s 500(1)
Migration Regulations 1994 (Cth), Sch 2, subcl 785.221 and subcl 866.221
Convention relating to the Status of Refugees 1951, Art 1A and Art 1F

Arquita v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 465
Dhayakpa v Minister for Immigration and Ethnic Affairs (1995) 62 FCR 556
Ovcharuk v Minister for Immigration and Multicultural Affairs (1998) 88 FCR 173

REASONS FOR DECISION

11 December 2003 Associate Professor S D Hotop, Deputy President

INTRODUCTION

1. The applicant has applied to the Tribunal for review of a decision made by a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs ("the respondent") on 26 July 2002 refusing to grant a Protection (Class XA) visa to the applicant on the ground that he is not a person "to whom Australia has protection obligations under the Refugees Convention".

2. At the hearing the applicant appeared in person without representation, and the respondent was represented by Ms J Andretich, a solicitor employed by the Australian Government Solicitor. The Tribunal had before it the documents ("T documents") lodged by the respondent in accordance with s 37 of the *Administrative Appeals Tribunal Act 1975* and a written statement of the applicant filed on 29 January 2003 (Exhibit A1). The applicant gave oral evidence. Mr A Goyul, an accredited interpreter in the Hindi language, was also in attendance.

THE FACTUAL BACKGROUND

3. The relevant background facts, as found by the Tribunal on the basis of the T documents, are as follows:

4. The applicant was born on 27 December 1979 in Mumbai, India and is an Indian citizen.

5. The applicant arrived in Australia on 20 March 2002 from India with an Indian passport and a valid Visitor (Class TR, Subclass 676) visa.

6. On 18 April 2002 the applicant lodged with the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") a form of "Application for a Protection (Class XA) visa" signed by him and dated 16 April 2002. In that form the applicant stated his reason for leaving India as follows:

> *"I am a Hindu and there is significant racial tension between Hindus and Muslims in my country….. My home state is Gujarat which is where most of the tension between Hindus and Muslims is occurring at present."*

In that form he also stated that he thought that, if he were to return to India, he might be harmed by "Muslims who are of a radical bent" because he had been "involved in actions against Muslims", and he referred to an enclosed statement by him. The applicant's enclosed statement was as follows:

> *"My parents and I had decided to spend our holidays in Australia for couple of days and for that we applied for visa on 30th January, and we got the visa next day. So I went to our native place in Ahmedabad to worship the God. That time riots between Hindu and Muslim was started. I was at my uncle's house in Ahmedabad when this riots was started….. So we dropped our idea to visit Australia. As I am Hindu I was not able to stop myself and I also participated in taking action against Muslims.*
>
> *There is Hindu and Muslim riots going on in India from last many years, but from last couple of months there is increase in the flame of fire between Hindu and Muslim.*
>
> *I was in Gujarat when all this riots started. On 27th February 2002 a train was burned at Godhara Station called Sabarmati Express, many people were burnt. I am a member of Bajrangdal group and because of this incident we all group members decided to be Tit for Tat with Muslims. Our main aim is to clear the Muslim not only from Gujarat but from India. On 2nd March 2002 an hostel was destroyed by a mob of around 1500 people who were armed with petrol bombs and choppers. Then we also burnt the houses, shops, vehicles and many thing which were authorised by Muslims. Even Muslims kidnapped, killed farmers, student and distracted all the Gujarat day to day life, for many days shops were closed, people stopped coming out from their houses, there were loose (sic) of property and money and whole economy crash downed. Even violence was started in Maharashtra.*
>
> *Due to this Gujarat was closed for many days. There were curfews in mostly every part in Gujarat. They even opposed to built Ram Mandis on 15th March 2002 at Ayodhya near Delhi. Muslims claimed that the place where Ram Mandis is to be built belongs to them but as not only place is our but whole India is our and they are just*

> *guest of India. To built Ram Mandis there was a 'Shila Puja' on 15th March and Muslim gave us threat for not to do Puja. Because of this I went to Ayodhya. Before few days of Puja there was a big fight between us. Many of Muslims identified me and knows me very well, they now wanted to kill me anyhow, and for this they are trying all the possibilities.*
>
> *Now I am in fear that they are going to kill me. If I would be in any part of India they will kill me so I came here in Australia as I already have the visa. If I will return to India they will kill me anyhow."*

(T6, pp 51-52)

7. On 26 July 2002 a delegate of the respondent determined that the applicant was not a person to whom Australia has protection obligations under the Refugees Convention and, accordingly, refused the applicant's application for a Protection (Class XA) visa.

8. On 19 August 2002 the applicant lodged with the Tribunal an application for review of the delegate's decision of 26 July 2002.

THE LEGISLATION

9. Section 29(1) of the *Migration Act 1958* ("the Act") authorises the respondent to grant to a non-citizen a visa to enter and/or remain in Australia. Section 31 of the Act provides that there are to be various classes of visas, including the class provided for by s 36, and that the regulations may prescribe criteria for visas of specified classes, including the class provided for by s 36.

10. Section 36(1) of the Act provides for a class of visa to be known as "protection visas". Section 36(2) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has "protection obligations under the Refugees Convention as amended by the Refugees Protocol". In s 5(1) of the Act, "Refugees Convention" is defined to mean "the Convention relating to the Status of Refugees done at Geneva on 28 July 1951" and "Refugees Protocol" is defined to mean "the Protocol relating to the Status of Refugees done at New York on 31 January 1967".

11. Under s 65(1) of the Act the respondent, if satisfied that specified criteria (including criteria for the grant of the relevant visa prescribed by the Act or the

regulations) and other matters have been fulfilled, is obliged to grant the visa, or, if not satisfied that those criteria and other matters have been fulfilled, is obliged to refuse to grant the visa.

12. The prescribed criteria for the grant of the various subclasses of visas were, at the relevant time, set out in Schedule 2 to the *Migration Regulations 1994* ("the regulations"). Among the criteria to be satisfied at the time of a decision on an application for either a Subclass 785, or a Subclass 866, protection visa was the following criterion set out in subclause 785.221 and subclause 866.221 in Schedule 2 to the regulations:

> *"The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention."*

In subclause 785.111 and subclause 866.111 in Schedule 2 to the regulations, "Refugees Convention" was defined to mean "the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees."

13. Section 91T of the Act provides:

> *" (1) For the purposes of the application of this Act and the regulations to a particular person, Article 1F of the Refugees Convention as amended by the Refugees Protocol has effect as if the reference in that Article to a non-political crime were a reference to a crime where the person's motives for committing the crime were wholly or mainly non-political in nature.*
>
> *(2) Subsection (1) has effect subject to subsection (3).*
>
> *(3) For the purposes of the application of the Act and the regulations to a particular person, Article 1F of the Refugees Convention as amended by the Refugees Protocol has effect as if the reference in that Article to a non-political crime included a reference to an offence that, under paragraph (a), (b), (c) or (d) of the definition of **political offence** in section 5 of the Extradition Act 1988, is not a political offence in relation to a country for the purposes of that Act."*

Section 5 of the *Extradition Act 1988* defines the expression "political offence", in relation to a country, to mean:

> *"an offence against the law of the country that is of a political character (whether because of the circumstances in which it is committed or otherwise and whether or not there are competing political parties in the country),…".*

The definition then goes on to specify (in paras (a)-(d)) various categories of offences that are not included within that definition but none of those exclusions is relevant in the present case.

THE REFUGEES CONVENTION

14. Australia is a party to the 1951 Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees ("the Refugees Convention"), and, accordingly, Australia has "protection obligations" under the Refugees Convention to a person who is a "refugee" within the meaning, and for the purposes, of that Convention. Article 1 of the Refugees Convention relevantly states:

> *"A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:*
>
> *(1) …;*
>
> *(2) …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;…*
>
> *…*
>
> *F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
>
> *(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
>
> *(b) he has committed a serious non–political crime outside the country of refuge prior to his admission to that country as a refugee;*
>
> *(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."*

THE ISSUE

15. By s 500(1)(c) of the Act the Tribunal's jurisdiction in this case is confined to a review of (relevantly) a decision to refuse to grant a protection visa to a person by reason of Article 1F of the Refugees Convention, and does not include a consideration and determination of the question whether that person is, or is not, a "refugee" within the meaning of Article 1A(2) of the Refugees Convention. Accordingly, the issue for the Tribunal's determination in the present case is whether the applicant falls within the terms of Article 1F of the Refugees Convention.

THE APPLICANT'S EVIDENCE

16. The applicant tendered in evidence a statement which had been handwritten by him and filed with the Tribunal on 29 January 2003. The contents of that statement are as follows:

> *"… Every religion has his own group, as has in Hindu. According to this I just played the role in the group just for self-defence. I just wanted to save my religion, there was no personal problem with the Muslim. At the time of that incident my main aim was to save the Hindus and that time I was not consuled (sic) about which group I am joining or what was the background of that group and I am having very poor knowledge of my group.*
>
> *As I wrote in last letter, I was in Ahmedabad at my uncle's house and all were Hindus there, and at the time of incident I joint the group who were taking part against Muslim, our main role was to safeguard the Hindus, so we helped the Hindus to move them to the safer place. In other incident one group was burning the shop of Muslims, so we (or I) helped them. I gave the liquid to burn the shop. Then I went to Ayodhya because there was 'Shila Puja' was going to take place. Even Muslims also came to Ayodhya to stop 'Shila Puja.' There were fights going on many areas of Ayodhya. Police tried to stop the fight, our group was also stopped to do any of the thinks. All of them were restricted to enter many areas of Ayodhya.*
>
> *My intention was just to stop the Muslims who were doing the wrong think. I am having many Muslim friends in India and I am and I was not having any problem with them. Even Australia is helping America for the war. So on other side of coin I have not done anything wrong and that too against God.. But now I am in fear that they will kill me. So now its up to you to save my life."*

(Exhibit A1)

17. In his oral evidence the applicant confirmed that the contents of both of his statements set out above (in paragraphs 6 and 16) are true and correct.

18. The applicant said that he first became involved with the Bajrang Dal group at the time of the riots between Muslims and Hindus in Ahmedabad (in early 2002). He said that his friends were already involved in that group and, at the time of the riots, they asked him to join the group and he did so. He said that their main purpose was to protect Hindus from being harmed by Muslims.

19. He referred to a particular incident in Ahmedabad in which his friends set fire to a shop/house owned by Muslims. He confirmed that he provided them with fuel to start that fire. He also confirmed that, when he gave the fuel to them, he knew what it was meant for. He said that he "advised a friend not to do this" but "she didn't listen" and so he "had to wait there". He confirmed that he stayed there while the shop/house was burned.

20. The applicant was referred to the following sentence in his first statement (see paragraph 6 above):

> *"Then we also burnt the houses, shops, vehicles and many thing which were authorised by Muslims."*

He explained that, by the word "authorised", he meant "owned".. Asked whether he and his friends had been involved in burning houses, shops, vehicles and other things owned by Muslims, he said that he could not remember exactly but he could remember the specific incident referred to earlier in his evidence. He added that although he used the term "we" in his statement, the other members of the group might have done those things. He acknowledged, however, that his recollection of the relevant events would have been clearer when he wrote that statement (at the time he applied for a protection visa in April 2002) than it is now, and that the contents of that statement are accurate.

21. Later, in response to the respondent's submissions, the applicant said that he had "not done anything intentionally". Asked to explain that statement, he said:

> *" I never planned in advance that I would go and harm Muslims or anything like that."*

(Transcript, p 38) Asked what his intention was, as regards his involvement with the Bajrang Dal group, he said:

> *" ….I wanted to protect Hindus."*

(Transcript, p38) He described the Bajrang Dal as a "non-political party". Asked whether he saw himself as engaged in a struggle against the Government of India, he answered, "No", and confirmed that it was purely a matter of Hindu versus Muslim. Finally, he denied that the Bajrang Dal was a terrorist group or was engaged in terrorist activities.

CONSIDERATION OF ISSUE AND FINDINGS

Article 1F of the Refugees Convention – the threshold requirement

22. Before any of the exclusionary provisions in paras (a), (b) and (c) of Article 1F of the Refugees Convention can apply, there must be "serious reasons for considering" that the relevant person has committed a crime within any of the categories referred to in those paragraphs. The meaning of the phrase "serious reasons for considering" has been explained by the Federal Court of Australia. In *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 French J said (at 563):

> *"Article 1F excludes from the application of the Convention persons with respect to whom there are serious reasons for considering that they have committed the classes of crime or been guilty of the classes of act there specified. The use of the words 'serious reasons for considering that' suggests that it is unnecessary for the receiving State to make a positive or concluded finding about the commission of a crime or act of the class referred to. It appears to be sufficient that there be strong evidence of the commission of one or other of the relevant crimes or acts…".*

More recently, in *Arquita v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 465 Weinberg J followed the approach of French J in *Dhayakpa*. Weinberg J said (at 478):

> *"It is sufficient, in my view, if the material before the decision-maker demonstrates that there is evidence available upon which it could reasonably and properly be concluded that the applicant has committed the crime alleged. To meet that*

requirement the evidence must be capable of being regarded as 'strong'.. It need not, however, be of such weight as to persuade the decision-maker beyond reasonable doubt of the guilt of the applicant. Nor need it be of such weight as to do so on the balance of probabilities. Evidence may properly be characterised as 'strong' without meeting either of these requirements.

…

The expression 'serious reasons for considering' means precisely what it says. There must be reason, or reasons, to believe that the applicant has committed an offence of the type specified. That reason or those reasons must be 'serious'."

Article 1F(b) of the Refugees Convention

23. The respondent submitted that the applicant falls within paras (a), (b), and (c) of Article 1F of the Refugees Convention. The Tribunal will first consider whether the applicant falls within para (b) of that Article.

24. Paragraph (b) of Article 1F of the Refugees Convention will apply to the applicant if there are "serious reasons for considering" that he has committed a "serious non-political crime" outside Australia prior to his admission to Australia. It is common ground that any relevant crime committed by the applicant was committed by him outside Australia prior to his entry into Australia. The question for determination by the Tribunal is whether there are "serious reasons for considering" that the applicant has committed a "serious" crime of a "non-political" character.

25. The policy of para (b) of Article 1F of the Refugees Convention is to protect the order and safety of the receiving state: *Dhayakpa* (above), at 565; *Ovcharuk v Minister for Immigration and Multicultural Affairs* (1998) 88 FCR 173 at 179, 185. Accordingly, the question whether there are serious reasons for considering that a person has "committed a serious non-political crime", within the meaning and for the purposes of para (b) of Article 1F, may be answered "by reference to notions of serious criminality accepted within the receiving state": *Ovcharuk*, at 185, 191.

26. As regards the concept of "serious crime", Professor G S Goodwin-Gill in *The Refugee in International Law* (2nd ed, 1996) refers (at p107) to a proposal made by the United Nations High Commissioner for Refugees ("UNHCR") in 1980, in relation to applications for asylum by 125,000 Cubans who had arrived in the United States, as follows:

> *"With a view to promoting consistent decisions, UNHCR proposed that, in the absence of any political factors, a presumption of serious crime might be considered as raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery. However, that presumption should be capable of rebuttal by evidence of mitigating factors, some of which are set out below. The following offences might also be considered to constitute serious crimes, provided other factors were present: breaking and entering (burglary); stealing (theft and simple robbery); receiving stolen property; embezzlement; possession of drugs in quantities exceeding that required for personal use; and assault. Factors to support a finding of seriousness included: use of weapons, injury to persons; value of property involved; type of drugs involved; evidence of habitual criminal conduct. With respect to all cases, the following elements were suggested as tending to rebut a presumption or finding of serious crime: minority of the offender; parole; elapse of five years since conviction or completion of sentence; general good character (for example, one offence only); offender was merely accomplice; other circumstances surrounding commission of the offence (for example, provocation and self-defence)."* (footnotes omitted)

In *Dhayakpa* (above), French J said (at 563):

> *"The adjective 'serious' in Art 1F(b) involves an evaluative judgment about the nature of the allegedly disqualifying crime. A broad concept of discretion may encompass such evaluative judgement. But once the non-political crime committed outside the country of refuge is properly characterised as 'serious' the provisions of the Convention do not apply. There is no obligation under the Convention on the receiving State to weigh up the degree of seriousness of a serious crime against the possible harm to the applicant if returned to the state of origin."*

27. According to the applicant's own evidence and his handwritten statements set out above (see paragraphs 6 and 16), he was directly involved, as a member of the Bajrang Dal group, in the malicious burning of valuable property owned by Muslims in Ahmedebad, India shortly before his departure for Australia. On the basis of that evidence and material, the Tribunal finds that there are "serious reasons for considering" that the applicant committed "serious" crimes – namely, arson and malicious damage to property – in India prior to his admission to Australia. The Tribunal, furthermore, is satisfied that his involvement in the commission of such serious crimes was voluntary and that there were no mitigating circumstances associated therewith.

28. The final question for the Tribunal's determination is whether the abovementioned serious crimes were "non-political" crimes within the meaning of Article 1F(b) of the Refugees Convention. In order to answer that question the Tribunal must pose another question, namely, whether the applicant's motives for

committing those crimes were “wholly or mainly non-political in nature”: see s91T(1) of the Act.

29. According to the applicant’s own evidence and his abovementioned handwritten statements, his motives for being involved with other members of the Bajrang Dal group in committing the crimes of arson and malicious damage to property owned by Muslims were solely to retaliate against Muslims for violent acts committed by Muslims against Hindus and thereby to support Hindus in their ongoing conflict with Muslims. The applicant readily acknowledged that, in involving himself in the activities of the Bajrang Dal and the commission of the crimes in question, he never regarded himself as being engaged in a struggle against the Government. Nor, in his evidence, did the applicant refer to any other motive for his relevant actions that might be described as “political”.. On the basis of the evidence and material before it, the Tribunal is satisfied that the abovementioned serious crimes of arson and malicious damage to property, which there are serious reasons for considering were committed by the applicant in India prior to his arrival in Australia, were “non-political” crimes within the meaning of s 91 T(1) of the Act and Article 1F (b) of the Refugees Convention, and the Tribunal so finds.

CONCLUSION

30. Accordingly, the Tribunal finds that there are “serious reasons for considering” that the applicant “committed a serious non-political crime” outside Australia prior to his admission to Australia , within the meaning , and for the purposes, of Article 1F(b) of the Refugees Convention. It follows from that finding that, in accordance with Article 1F of the Refugees Convention, the provisions of that Convention do not apply to the applicant and that, accordingly, the applicant is not a person to whom Australia has protection obligations under that Convention. The applicant does not, therefore, satisfy one of the essential primary criteria for the grant of a Protection (Class XA) visa. In that circumstance, s 65(1) of the Act provides that the applicant’s application for the grant of such a visa must be refused.

31. That conclusion suffices to determine this application for review and it is, therefore, unnecessary for the Tribunal to consider and determine whether the

applicant also falls within para (a) and/or para (c) of Article 1F of the Refugees Convention.

DECISION

32. For the above reasons the Tribunal affirms the decision under review.

I certify that the 32 preceding paragraphs are a true copy of the reasons for the decision herein of Associate Professor S D Hotop, Deputy President

Signed:

.....(sgd V Wong).....

Associate

Date of Hearing	24 July 2003
Date of Decision	11 December 2003
Counsel for the Applicant	In person
Counsel for the Respondent	Ms J Andretich
Solicitor for the Respondent	Australian Government Solicitor