

060465909 [2006] RRTA 194 (21 November 2006)

DECISION RECORD

RRT CASE NUMBER: 060465909

DIMA REFERENCE(S): CLF2006/16555

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Susan Pinto

DATE DECISION SIGNED: 21 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, 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 and posted on same day.

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.

The applicants 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.

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.

Protection visa application

According to his protection visa application, the applicant is in his thirties. The applicant indicated on his protection visa application that his family resides in India. The applicant also indicated that he was married in the late 1990s. The applicant also indicated that he had several years of education in India and that prior to leaving India he resided in New Delhi.

The applicant's wife is included in the application.

In relation to his refugee claims, the applicant states on the protection visa application that he left India because he and his wife had their life threatened and were harmed by the applicant's relative A. The applicant states that he fears returning to India because he and his wife will be abducted and forced to separate. The applicant states that his relative A and some of his friends will harm him. The applicant also states that this will happen because his relative A and their friends have strong links with a Mafia Group. The applicant states that the authorities cannot protect him because the Mafia Group is connected with the police and landlords.

The applicant also provided a statutory declaration attached to his protection visa. The visa applicant states that he is afraid to return to India because of his other relatives and friends. The applicant states that they are connected to the "Mafia Group". The applicant states that when he was few years of age his mother died and his father remarried. The applicant's relative A was "not good" to the applicant. The applicant states that relative A is a "hard drinker" and a gambler, who one day lost all of his money through gambling. The applicant offered to help relative A by joining his business and offered to share his home with relative A. However, when relative A joined the business, he lost money in the business while the applicant was away on a business trip. Relative A was drinking regularly and tried to have an intimate relationship with the applicant's wife.

The applicant told relative A to stop his "bad habits" and to no longer come to the applicant's home. A few days later, relative A told the applicant that there was no money to pay the workers and their salary had been pending for the last few months. The applicant suspected that relative A had been involved in fraud. The following day, relative A came to the applicant's office with a "Mafia Group" who told the applicant that he would have to repay

the bank loan with the sale of the applicant's house and that he had to leave the office. The Mafia Group wanted to take control of the applicant's office and forced him to leave the office.

The applicant also claims that few days later, he went to relative A's house where he was having a party with his friends. The applicant became involved in a fight with him and his friends and they threatened to kill the applicant. The applicant received severe injuries and he and his wife suffered depression because they lost everything. The applicant believed that the Mafia Group was dangerous and thought it was best to go overseas. The applicant arranged for Australian visas with the help of his other relative.

The applicant appeared before the Tribunal to give evidence and present arguments. However, the applicant advised the Tribunal that his wife was unable to appear before the Tribunal due to an accident the previous day. The applicant advised the Tribunal that he wished his wife to have the opportunity to appear before the Tribunal. The Tribunal agreed to adjourn the hearing and the applicant was notified by telephone and letter that the hearing would be held on another day.

Tribunal Hearing

The applicant and his wife appeared before the Tribunal on a particular day. The Tribunal was assisted by an interpreter.

The Tribunal explained the Convention definition to the applicant and gave him an opportunity to read the Convention definition.

The applicant's oral evidence to the Tribunal follows.

The applicant completed his protection visa application by himself. The applicant is from New Delhi and his wife is from a different State. The applicant and his wife have been married for several years.

The applicant had a business in India. The applicant had the business for several years. The applicant's relative A, had his own business which lost money due to relative A's gambling and drinking. Due to his own money losses, relative A joined the applicant's business. However, after about a year, the applicant realised that the business was having problems due to relative A's continuing gambling. The problems started in early 2000s and the applicant had no money to pay his workers. The applicant asked relative A to leave his business, but he refused to do so. Relative A's friends would come to the applicant's business premises every day and drink and gamble. Relative A's friends were part of the mafia group. Every time the applicant went to the business premises, relative A's friends would be there drinking and gambling. Relative A's friends would threaten the applicant and hit him when he tried to come into the business premises.

The applicant lost everything and had bank loans which he needed to pay. The applicant tried to get the business back on track but was unable to do so. The applicant was also unable to keep his employees because relative A would hit and threaten the employees.

The applicant reported it to the police. However, the police did not do anything to help the applicant. The applicant paid the police, but they only told the applicant that they should

speak to his relative A about the problems. The applicant stated that the police in India are not like they are in Australia.

The applicant had no money to look after his family and he sold business and property and paid off all his debts. His other relative advised the applicant that he should try to start again overseas. The applicant cannot return to India because his relative A would intervene in any business venture which the applicant attempted to start in New Delhi. The applicant also cannot go elsewhere because he has no contacts and is unable to start again in another part of India.

The Tribunal advised the applicant that it had difficulty understanding how the applicant believed that he was persecuted for a Convention reason in India. The Tribunal again explained the Convention to the applicant.

The applicant stated that he did not know the Convention definition when he lodged his application for a protection visa. The applicant told the true story and if he had known there was a Convention definition he would have changed his story. The applicant went to a solicitor who told him that he did not meet the Convention definition and told him that he would not take on his case. The applicant again stated that he had no knowledge of the Convention definition, but everything that is in his statement is the truth.

The Tribunal asked the applicant whether anything else happened in India which he wished to discuss. The applicant said that he has told the Tribunal exactly what happened.

The applicant's wife confirmed that the claims which have been made to the Tribunal are truthful.

FINDINGS AND REASONS

The Tribunal accepts that the applicant is a national of India.

The applicant claims that he had a business in New Delhi and that his relative A and his relative A's friends took over the business for their own financial gain. The applicant claims that as a result of the involvement of his relative A and his relative A's friends, who frequently gambled and drank, the business suffered serious financial losses and the applicant was eventually forced to close the business. The applicant claims that his relative A's friends harmed the applicant physically and threatened the applicant whenever he came to the business premises and attempted to manage the business. The applicant claims that although he paid a bribe to the police, they took no action to resolve the situation.

The Tribunal accepts the applicant's claims. However, the Tribunal is not satisfied that the applicant and his wife fear harm for a Convention reason. The Tribunal's reasons follow.

The applicant's evidence does not establish that his relative A and his friends, members of a Mafia group were seeking to harm the applicant because of his nationality, race, religion, political opinion or membership of a particular social group. The applicant's evidence establishes that his relative A and friends were motivated by financial gain, and, in his relative A's case, as a result of financial losses that he incurred due to gambling, drinking and failed business ventures. The Tribunal accepts that the applicant was physically harmed and sustained injuries. However, the Tribunal is not satisfied that the harm suffered by the applicant was anything other than as part of the dispute between himself and his relative A

and his relative A's friends due to the desire of the relative A and his friends to continue occupying the applicant's business premises for their personal use and own financial gain. Accordingly, the Tribunal is not satisfied that the applicant has suffered serious harm in the past for a Convention related reason.

The Tribunal accepts the applicant's evidence that he does not wish to return to India due to his failed business venture and accepts that it would be difficult for the applicant and his wife to re-establish themselves in another part of India where they have no business contacts. The Tribunal also accepts that the applicant does not wish to return to New Delhi due to the applicant's relative A and his friends continuing desire for financial gain at the applicant's expense. However, as stated above, the Tribunal is not satisfied that the motivation of the applicant's relative A and friends is anything other than their own financial and personal gain. Nor does the Tribunal accept that the applicant's reluctance to return to other parts of India because he has no contacts establishes that he fears harm due to a Convention reason. The Tribunal is, therefore, not satisfied that the applicant will suffer serious harm in the reasonably foreseeable future for a Convention related reason.

The Tribunal has also considered the action of the Indian police and whether their unwillingness to assist the applicant to resolve the dispute was motivated by a Convention reason. The applicant's evidence indicates that although he paid the police a bribe they did nothing to resolve the situation and instead told the applicant that he should speak to his relative A about the problems. The Tribunal accepts the applicant's evidence that some aspects of the Indian police force are involved in corruption and that the standard of policing in India differs from Australia. However, the Tribunal considers that their inefficiency and corruption is the reason that they did not make any attempts to resolve the situation. The Tribunal is not satisfied that the applicant's evidence establishes that the failure of the police to make any efforts to resolve the situation was motivated by a Convention reason.

The Tribunal is therefore not satisfied that the applicant has a well founded fear of persecution within the meaning of the Convention. For the same reasons, the Tribunal is not satisfied that the applicant's wife has a well founded fear of persecution within the meaning of the Convention. The Tribunal is also not satisfied that applicant's wife is the spouse or dependent of a person to whom Australia owes protection obligations under the Refugees Convention.

CONCLUSIONS

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicants are persons to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicants do not satisfy the criterion set out in s.36(2) for a protection visa and cannot be granted protection visas.

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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