

1210730 [2013] RRTA 36 (10 January 2013)

DECISION RECORD

RRT CASE NUMBER: 1210730

DIAC REFERENCE(S): CLF2011/65096

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Irene O'Connell

DATE: 10 January 2013

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 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 applied to the Department of Immigration for a protection visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] April 2011, this was deemed to be invalid and he lodged a second application [in] November 2011.
3. The delegate refused to grant the visa [in] June 2012, and the applicant applied to the Tribunal for review of that decision.

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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention.
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of 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.
7. 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, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. 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.
13. 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 being persecuted 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.
14. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. Whether an applicant is a person in respect of 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.

Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant and the application for review. In his application for a protection visa the applicant sets out the following. He is [age deleted: s.431(2)] years of age, of Sikh ethnicity and religion. He was born in [village deleted: s.431(2)] and that he speaks reads and writes English and Punjabi. The applicant arrived in Australia [in] November 2008 on a student visa. He does not list his education or employment history but lists his occupation as farmer. He was divorced in 2010.
20. The applicant provided a short written statement with his protection visa application in which he sets out the following. He states that he was returning home on a bike with his girlfriend when a group of drunken men began teasing his girlfriend and following them resulting in him fighting with them. A few days later these same people came looking for him and threatened him and he realised that they were members of an extremist group called KLF.
21. The applicant states that he fears that if he goes back to India members of this group will seek to kill him. He states that his parents are living with other relatives in another town because the KLF people have come to the house to find him.
22. He states that he believes the group will seek him out if he is to return to India as revenge following his dispute with him when he was protecting his girlfriend. He does not believe the

authorities can do anything to protect him as “they have no say and they don't want to get involved with them”.

23. Provided with the application is a photocopy of the applicant's passport. The passport indicates that the applicant was issued with his passport in May 2008, his student visa [in] October 2008 and he arrived in Australia [in] November 2008.
24. No additional information is provided in the application for review. The applicant appeared before the Tribunal on 8 January 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
25. The applicant was asked for details about his employment and education. He stated that he had completed 8 years of education and began working when he was 15 years old as a farmer. He stated that he had worked for some 10 years prior to his arrival in Australia.
26. The applicant was asked about his arrival in Australia. He stated that he came to Australia on a student visa and that he commenced a [course] in [city deleted: s.431(2)]. He could not recall the name of the college at which he studied but he stated that he studied for one year before discontinuing his studies and taking up work.
27. I asked the applicant about his family and he stated that his parents live in India. Asked about his marital status he stated that he is divorced. Asked to elaborate he stated that he married [in] March 2008 and then came to Australia on a dependent student visa and that in fact it was his spouse who was enrolled in the cooking course. He stated that the marriage ended in February 2009 when his wife met a [man].
28. I asked applicant why he believed he could not go back to India. He stated that he fears harm from the Khalistan Foundation. Asked if he could elaborate further he stated that he was on his way home with his girlfriend and he had an argument with a group of men who were harassing them. On returning home he realised that the people he had encountered were members of the Khalistan Foundation. I asked the applicant how he knew this and he stated that they came to his house to threaten him but he was hiding. He stated that they came to his house on several occasions but each time he was either not home or in hiding. I asked him again how he knew that these persons who came to his house were from the Khalistan Foundation he stated that his parents told him so.
29. I asked the applicant when he had the encounter with these men. He stated in May 2008. I noted that the applicant stated that he was married in March 2008 and asked the applicant to clarify whether he was with a girlfriend or his wife. He stated that he was married in March 2008 and he was with his girlfriend as he had both a girlfriend and was married.
30. The applicant stated that some seven men approached him. I put to the applicant that it seemed unusual that if he was being attacked by seven men he was able to assault and harm one of them. The applicant stated that six of them had left and only one had remained and he attacked this person, who then told his friends and they then came looking for him.
31. I put to the applicant that I had difficulty accepting his claims particularly in respect to the claim that the men were part of the Khalistan Foundation. I put to the applicant that country information indicated that the Khalistan Liberation Front (KLF) is by and large defunct. The applicant stated that what he said was correct.

32. I asked the applicant whether or not he had approached the police. He stated no. He stated that police are scared of these people. I noted that country information indicated that the KLF was by and large defunct but that the police had made arrests in respect to the KLF.
33. I asked applicant whether he had considered moving to another part of India to avoid these people. He stated that it is impossible as they will find you wherever you go.
34. I asked the applicant where the attack had taken place. He stated in [city deleted: s.431(2)]. I noted that this would be a big city. The applicant stated that this was the case. I put to the applicant that if this event happened it was some four years ago and I had difficulty understanding why they would continue to take an interest in him. The applicant stated that they did continue to take an interest in him and they had continued to threaten him and often visited his parents and asked about his whereabouts. He stated that his parents had moved and were no longer living in the same village. He stated that if his parents were to go back to their village that could be kidnapped or killed by these people.
35. I noted that the parents had successfully relocated. The applicant stated that this was the case. I asked if he could not himself also relocate. The applicant reiterated that it is not possible as they would find him whenever he went. I asked the applicant why he did not go to the police. He stated the police do not consider themselves to have any obligation to him and the police would not do anything for him.
36. I asked the applicant if there were things he wished to raise with the Tribunal. He stated that he had nothing to add. I asked applicant if there were any other reasons he feared harm on returning to India. The applicant stated that there were no other concerns.

Country Information

37. The following is sourced from the Thaindian News, dated 31 May 2010 in reference to the KLF.

INDIA: Punjab police arrest wanted Khalistan Liberation Force terrorist

Punjab police have arrested a terrorist of the outlawed Khalistan Liberation Force (KLF), wanted in over 25 criminal cases by the police and recovered 2.3 kg RDX, a detonator, 30 bore pistol and 28 cartridges from him.

Bakshish Singh alias Baba was arrested on Saturday by a team of the special operation cell of the intelligence wing of Punjab police.

According to Police, the terrorist was allegedly working for revival of the banned terrorist outfit.

"Baba was working to revive the defunct KLF in Punjab and was working at the behest of Pakistan's spy agency ISI (Inter Services Intelligence). He was planning major strikes in Punjab and Haryana in the coming months. We will try to unearth his

links and plans during the interrogation,' said Amritsar Police Commissioner Varinder Kumar Sharma here.

Baba, is a native of Nizamniwala village in Punjab's Patiala district and was involved in several terrorist activities in the region.

Police have termed arrest as a big achievement.

'This arrest is a big achievement for us,' Sharma said.

During the interrogation, Baba purportedly admitted that he was involved in planting Improvised Explosive Devices (IEDs) outside a liquefied petroleum gas bottling plant in Nabha town in Patiala district and an explosive device in a Maruti car near the Indian Air Force's Halwara air base in January this year, he said.

Police stated that Baba was involved in more than 25 cases, including a bomb attack on the convoy of Dera Sacha Sauda sect chief Gurmeet Ram Rahim at Karnal, in Haryana, in February 2008.

After that he escaped to Malaysia with the help of another wanted terrorist, Harminder Singh alias Mintu of Goa, and had later reached Pakistan, the police official added.

FINDINGS AND REASONS

38. On the basis of the applicant's passport I find that the applicant is a citizen of India and that India is the country of nationality in respect to consideration of his claims for refugee assessment and the country of reference in respect to consideration of his claims under "complementary protection."
39. I am not satisfied that the applicant is in genuine fear of persecution or that there is a real chance of persecution on his return to India. My reasons for this finding are as follows.
40. As set out above, the applicant claims to fear harm on return to India stem from a claimed random encounter in 2008 with a group of men, associated with the KLF, who harassed him and his girlfriend. The applicant claims to have assaulted one of these men and that because of this they have made continuous threats against him and he fears that they will harm him should he return to India.
41. I did not find the applicant to be a credible witness. At the hearing his responses to questions were vague, limited and evasive. He did not provide spontaneous or ready detail to questions asked. When invited to elaborate he was unable to do so. For example the applicant asserted that his claimed encounter in 2008 was with members of the KLF but provided no relevant detail on how he knew these persons were members of the KLF other than that his parents had told him so. Nor was the applicant able to provide relevant or persuasive detail about his claim that he has been subject to ongoing threats and why he did not go to the police about the claimed threats.
42. The paucity of the applicant's evidence leads me to reject the applicant's claim that he had an encounter with a group of men associated with the KLF in 2008 and since then they have continued to threaten him. As I do not accept this claim I do not accept that there are persons motivated to harm the applicant on his return to India.
43. The applicant has not made any other claims for protection. In these circumstances I do not accept that the applicant has a well-founded fear of persecution for a Convention reason on his return to India now or in the reasonably foreseeable future. Nor do I accept that there are substantial grounds for believing that as a necessary and foreseeable consequence of his

being removed from Australia to a receiving country that there would be a real risk of the applicant suffering significant harm.

CONCLUSIONS

44. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies does not satisfy the criterion set out in s.36(2)(a).
45. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
46. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

DECISION

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