

0901080 [2009] RRTA 374 (1 May 2009)

DECISION RECORD

RRT CASE NUMBER: 0901080

DIAC REFERENCE(S): CLF2008/144635

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Linda Kirk

DATE: 1 May 2009

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of India arrived in Australia [in] September 2008 and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] October 2008. The delegate decided to refuse to grant the visas [in] January 2009 and notified the applicants of the decision and their review rights by letter [on the same date].
3. 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.
4. The applicants applied to the Tribunal [in] February 2009 for review of the delegate's decisions.
5. 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

6. 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.
7. 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).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.
9. 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'

10. 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.

11. 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.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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.
19. 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

20. The Tribunal has before it the Department’s file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate’s decision, and other material available to it from a range of sources as referred to in this decision.
21. [In] March 2009 the Tribunal wrote to the applicants advising that it had considered all the material before it relating to their applications but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicants to give oral evidence and present arguments at a hearing [in] April 2009. The applicants were advised that if they did not attend the hearing and a postponement was not granted, the Tribunal may make a decision on their case without further notice. The letter and attached documents were sent by registered post to the address of the applicants’ migration agent, [name deleted: s431(2)].
22. The applicants failed to attend the scheduled hearing [in] April 2009. [In] April 2009 a Tribunal officer contacted the applicants’ agent who confirmed that she had received the hearing invitation and had forwarded it to the applicants. In these circumstances, and pursuant to s.426A of the Act, the Tribunal has decided to make its decision on the review applications on the basis of the available information without taking any further action to enable the applicants to appear before it.
23. The first applicant is 19 years old and was born [in] 1989 in Jalandhar in the Punjab, India. He completed nine years of education and attended [a] Senior School (Secondary) in Jalandhar from March 1995 to December 2005. Prior to coming to Australia he was unemployed. His stated religion is Catholic and he claims to be in a defacto relationship with the second applicant which began in Sydney [in] July 2008. His parents, brother and two sisters reside in India. He has an Indian passport issued [in] November 2007.
24. The second applicant is 18 years old and was born [in] 1990 in [District D] [Town T] in the Punjab, India. He completed ten years of education and attended [a] [high school in District D, Town T], from March 1996 to 2006. His stated religion is Catholic and he claims to be in a defacto relationship with the first applicant which commenced [in] July 2008 in Sydney. His parents, brother and sister all reside in India. He holds an Indian passport which was issued [in] November 2006.

25. The first and second applicants arrived in Australia for World Youth Day [in] July 2008 on tourist visas issued to them [in] May and June 2008 respectively. They returned to India [in] July 2008 and then arrived again in Australia [in] September 2008.

Applicants' Claims

26. The first applicant's claims were outlined in answers to questions 41-45 of his protection visa application. He claims he left India because his relationship with his same-sex partner, the second applicant, was discovered by his parents. He claims that his family was ashamed of him and they were persecuted by both their parents because of their homosexual desires. The first applicant was held responsible for the relationship because he is the eldest of the two.
27. The applicants had been friends in India for many years and travelled together to Australia for the World Youth Day festival. After arriving in Australia their friendship developed into a relationship and they started living together. They hoped to continue their relationship when they returned to India. However, when they returned home their parents discovered their relationship and they were both beaten and locked in their rooms. They managed to escape from their homes and obtained tickets to travel back to Australia. They travelled on different flights to avoid being caught. They have been living together since arriving back in Australia.
28. The first applicant claims that if he returns to India he will be killed or severely injured and forced to marry a girl. His parents have disowned him as a son and if he returns to India they will have to deal with his relationship which is totally unacceptable to them. He claims he will be harmed or mistreated by members of his family, people in his town and members of his church who will not accept his choice of sexuality.
29. He claims he cannot relocate to another part of India as he is unemployed and cannot support himself and the second applicant. He will always be worried that people will discover the true nature of their relationship and they will not be offered work and will be shunned by employers because of their sexuality
30. The first applicant claims that the second applicant's parents do not like the fact that he is dark skinned and the second applicant is fair. They are young and do not have anyone to support them and defend their choice. He claims that the authorities in India will not assist people in homosexual relationships.
31. The second applicant's claims were also outlined in answer to questions 41-45 of his protection visa application. He claims that he left India because he was persecuted due to his homosexual relationship with the first applicant.
32. He claims that although they had known each other as friends before travelling to Australia, their relationship did not begin until they arrived in Australia. He is now in love with the first applicant and they have made a commitment to be together.
33. The second applicant claims that when they returned to India after two weeks in Australia they hid their passports in case they needed them in the event that their relationship was not accepted by their families. Within days of their return they were discovered and severely beaten and were separated.

34. They both bought tickets for Australia and left India on the same day but on different flights. He claims that they are both young and have no one who can support them and speak on their behalf with family or the authorities. They cannot seek legal help in India as they have not worked and they have spent all the money their parents gave them for their first trip to Australia on airfares.
35. The second applicant fears that his parents, people from the village and members of his parish will try to kill him or force him to separate from the first applicant. He is concerned that they will also try to harm the first applicant as he is blamed for instigating the relationship. His parents do not accept the relationship and are even more upset because the first applicant is dark skinned and therefore not acceptable to them.
36. He claims that he will also be at risk from the community as he does not have an older person to protect him and therefore he will not have support from the police or government authorities.
37. The second applicant claims that as they are both the eldest members of their respective families they are expected to provide an appropriate role model for their siblings. They are being punished and threatened with death to change their decision to live together and to marry a girl chosen by the family.
38. The applicants' agent submitted a statement to the Department of Immigration and Citizenship [in] January 2009. In this statement it is claimed that the two applicants are in a committed relationship and that their families do not accept the relationship. They have been physically and verbally abused. They would be forced to marry if they return to India. They will be punished by the police and even blackmailed if they are discovered to be in a relationship and do not have the networks, wealth or social contacts to support themselves or seek protection.

FINDINGS AND REASONS

39. The applicants claim to be nationals of India. They both hold and twice travelled to Australia on Indian passports issued in their names. The Tribunal accepts that the applicants are Indian nationals and, for the purposes of the Convention, has assessed their claims against India as their country of nationality.
40. The applicants claim that they are in need of protection because they face persecution and physical harm from their family and community on the basis that they are in a homosexual relationship with each other.
41. The Tribunal finds that the harm feared by the applicants involves serious harm and systematic and discriminatory conduct, and that the essential and significant reason for the harm feared is their membership of a particular social group of homosexuals in India, which is a Convention ground.
42. The Tribunal's task in this case is to consider whether the applicants genuinely fear persecution for reasons of their membership of a particular social group, and if so, whether that fear is well-founded. This requires examining the claims that the applicants have raised and the evidence they have submitted, in addition to relevant independent country information.

43. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is “well founded” or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as necessary to enable the examiner to establish the relevant facts. A decision maker is not required to make the applicant’s case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v GUO & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)
44. The Tribunal has found that the applicants’ claims are lacking in detail in significant respects. They relate to a generalised fear that because they are in a homosexual relationship that they will be subjected to persecution and discrimination by their families and community.
45. The information as presented in their protection visa applications is minimal and, without having the benefit of being able to question the applicants at a hearing about why and how they will be targeted, the Tribunal finds that there is not enough information to find that there is a real chance that the applicants will suffer serious harm amounting to systematic and discriminatory conduct on their return to their country.
46. The applicants’ claims gave rise to many issues which the Tribunal wished to explore at the hearing, such as:
 - When they developed feelings for men and/or realised that they were homosexual;
 - Whether they had been involved in homosexual relationships with other partners in the past;
 - If so, how these relationships were perceived by their families and communities and whether they were subjected to mistreatment as a consequence;
 - Whether they had been involved in previous heterosexual relationships;
 - Why their long-standing friendship did not develop into a loving relationship prior to their arrival in Australia;
 - Whether they continue to be in a homosexual relationship with each other or another person;
 - How they are able to reconcile their homosexuality with the teachings of the Catholic church;
 - When and how their families discovered that they were in a homosexual relationship;
 - The nature of the beatings etc that they received and from whom;
 - How long they were locked in their rooms and by whom;

- Who made the threats to them that they would be killed or severely injured and forced to marry a girl if they returned to India;
 - What is the relevance of the shade of the applicants' skin in their parents' acceptance or otherwise of their relationship;
 - Why the applicants cannot relocate and/or find work in another part of India where homosexuality is more tolerated;
47. Given the paucity of evidence and the fact that the applicants were put on notice that the Tribunal could not make a favourable decision on the information provided and that the applicants did not attend the hearing or make any contact with the Tribunal, the Tribunal is not satisfied on the evidence before it that the applicants have a well-founded fear of persecution within the meaning of the Convention.
48. As a consequence of the failure of the applicants to provide evidence to substantiate their claims, the Tribunal is not satisfied that the applicants are homosexual and cannot therefore be satisfied that they will be harmed or mistreated by their family members, members of their communities or members of their church. Nor can the Tribunal be satisfied that they will be forced to marry a girl chosen by their families if they return to their homes in India.
49. The Tribunal is satisfied therefore that the applicants do not face a real chance of persecution now or in the reasonably foreseeable future if they were to return to India for reason of their claimed membership of a particular social group of homosexuals.

CONCLUSIONS

50. The Tribunal is not satisfied that the applicants are persons to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

51. The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

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 *Migration Act 1958*.

Sealing Officer's I.D. prrt44