

1413568 [2014] RRTA 780 (31 October 2014)

**DECISION RECORD**

**RRT CASE NUMBER:** 1413568  
**COUNTRY OF REFERENCE:** United Kingdom  
**TRIBUNAL MEMBER:** Carolyn Wilson  
**DATE:** 31 October 2014  
**PLACE OF DECISION:** Adelaide  
**DECISION:** The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

Statement made on 31 October 2014 at 1:25pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

## 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 applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who are citizens of the United Kingdom, applied to the Department of Immigration for the visas [in] September 2013 and the delegate refused to grant the visas [in] July 2014.
3. The first and second named applicants appeared before the Tribunal on 16 October 2014 to give evidence and present arguments.
4. The applicants were represented in relation to the review by their registered migration agent.

### RELEVANT LAW

5. The criteria for a protection visa are set out in s.36 of the Act and 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 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

#### Refugee criterion

6. 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 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).
7. 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.
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)). Examples of 'serious harm' are set out in 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 '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.

#### **Section 499 Ministerial Direction**

19. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

#### **Member of the same family unit**

20. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition.

#### **CONSIDERATION OF CLAIMS AND EVIDENCE**

21. The issue in this case is whether the applicants satisfy either the refugee or complementary protection criteria. For the following reasons, the Tribunal has concluded that they do not, and finds the decision under review should be affirmed.
22. The applicants are a family unit, with only the parents, the first and second names applicants, making claims to meet the criteria in s.36(a) or (aa). The children have applied as members of their family unit.
23. The applicants were all born in the United Kingdom. They arrived in Australia in April 2010.
24. [Applicant 1] made the following claims in his written application:



- His parents are Turkish Muslims. His parents chose a wife for him, but he went against their wishes and in 2000 married his girlfriend who had [a non-Muslim] background. This brought shame on his family.
- He was constantly threatened by his family, including threats to make his children 'go missing'. His parents would show up uninvited at his house to abuse him, his wife and children, and would invite them over to their house just to humiliate them. When they ate at his parents' house, other family members ate first and they had to wait.
- They have all converted to Christianity since being in Australia. His parents found out about this and have called them about this. His wife's mother told them not to return to the UK or their lives will be in danger from [Applicant 1]'s family.
- He has been beaten twice. He did not report either occasion to the police because he did not know who beat him and the police could not protect him. If they reported the problem it could cost them their lives.

25. [Applicant 2] made the following claims in her written application:

- Her in-laws opposed their marriage. They would humiliate her and her children, both in their own home and when visiting the in-laws. For example, her mother-in-law once pulled down her son's trousers to show everyone he had not been circumcised and was not therefore a true Muslim. When she tried to intervene and protect her son, she was beaten.
- They were not allowed to eat with her husband's family, so they would have to wait and eat after her in-laws were finished eating.
- The in-laws know about them converting to Christianity and as a result their lives would be in danger if they returned to the UK.

26. The delegate did not deal with the substantive claims made by the applicants, but found they were not owed protection obligations as they could access effective protection in a third country. That is, as citizens of the UK they were entitled to live, travel and work in other European Union countries. Pursuant to s.36(3) of the Act, Australia is taken not to have protection obligations to non-citizens who have not taken all possible steps to avail themselves of a right to enter and reside in a country apart from Australia.

27. On review the applicant's provided a letter of support from [Applicant 2]'s mother and a letter from a mechanic in the UK. [Applicant 2]'s mother says she witnessed the problems and harassment caused by [Applicant 1]'s family. The Tribunal has given this some weight in accepting relations were very unpleasant between the applicant's and [Applicant 1]'s family. The mechanic, , says he serviced the [applicants'] vehicle [in] November 2009. When they brought the vehicle back to him to check [later in] November 2009 he found 4 of the 5 alloy bolts on one of the wheels were missing. The applicants say this is evidence [Applicant 1]'s family were attempting to seriously harm them by causing an accident. The Tribunal has considered this letter but is not satisfied on this information alone that is it evidence someone associated with [Applicant 1]'s family or community was attempting to seriously harm them. The Tribunal notes neither the applicants nor their mechanic brought the matter to police attention. The applicants say that after this they did not even feel safe in

[Applicant 2]'s mother's house, and therefore moved into a flat in hiding until they came to Australia.

28. At the hearing the applicants maintained they feared serious harm, including death, should they return to the UK. Their conversion to Christianity, including their baptisms in May 2012, had angered [Applicant 1]'s family to the point they feared for their and their children's lives. They maintain there would be nowhere in the UK they could safely relocate, as members of the Muslim community would see them and report back to their family where they were. They maintained they could not seek protection in a third country in the European Union as their family could also easily travel to those countries to harm them. As a family they had settled here, felt safe here, and were asking the Australian government for help.
29. The Tribunal has concerns about how well-founded the applicants' fear is. The Tribunal notes they claim to have been harassed and humiliated by [Applicant 1]'s family since before they married in 2000. Yet they chose to live in the same area as [Applicant 1]'s family throughout their married life in the UK. Further, at no point did they seek help from the authorities in the UK. The Tribunal acknowledges their claimed fear that in contacting the police they may have enraged his family more, but the Tribunal also considers this is something the authorities would have been sensitive to and could have assisted the family discreetly or recommended relocation if considered necessary.
30. The Tribunal put to the applicants at the hearing that their decision to live near [Applicant 1]'s family from 2000 to 2009 was an indication they did not have a subjective fear of serious harm from them. [Applicant 2] said they did not move because for some of that time they were in a dispute with a neighbour over an extension. The Tribunal does not accept this explanation and finds it only accounts for some of the period between 2000 and 2009 and does not accept it would be reason enough not to move if their fear of harm was genuine. The Tribunal acknowledges they moved into a flat 'in hiding' for the last few months before they came to Australia. However, the flat they moved to was only 9 minutes drive or 3.1 miles from [the street]<sup>1</sup>, where [Applicant 1]'s family lived. The Tribunal notes the family were not troubled when they lived at that address, which the Tribunal finds goes to the issue of how far [Applicant 1]'s family intend to go to harm them or to seek them out. The Tribunal acknowledges [Applicant 1]'s claim to have been beaten twice, in 2003 and 2005, but there were no further physical attacks on him after that time. The Tribunal is troubled as to why the family did not move, did not seek help from the authorities, and continued to have contact and visits with [Applicant 1]'s family for 9 years, if the situation was as bad as claimed. The Tribunal acknowledges the situation has potentially escalated since the applicants came to Australia, with them being baptised in May 2012. But the evidence at hearing was that since the abusive phone calls when [Applicant 1]'s family became aware of the baptism, there has been no further contact from them for the last 2 years.
31. The Tribunal accepts [Applicant 1]'s family have been opposed to his marriage to a non-Muslim and have caused him, his wife and children, much distress. The Tribunal accepts apostasy is a serious matter in Islam and that their conversion to Christianity would increase the level of disagreement and tension between the applicants and [Applicant 1]'s family. However for the reasons given above, the Tribunal has concerns about how well-founded the fear of harm is.

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<sup>1</sup> Information based on a search on Google maps. A printout of that search has been placed on the Tribunal file.

32. However, even if the Tribunal was satisfied the applicants had a well-founded fear of persecution from [Applicant 1]'s family and the local Muslim community, for the following reasons the Tribunal considers the applicants could avail themselves of state protection.
33. The Tribunal does not accept the applicants' claim that they could not avail themselves of state protection because it is not sufficient, or that it would put them at greater risk. If there was risk that seeking assistance would enrage [Applicant 1]'s family and community, such assistance could be given discreetly and may include a recommendation by the authorities to relocate. The case law makes it clear the state concerned is not required to guarantee the safety of its citizens from harm caused by non-state persons: *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [26]. What is required is a reasonable level of protection, that is, an obligation on the state to take 'reasonable measures' to protect the lives and safety of its citizens, including 'an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system': *S152/2003* at [28]. What amounts to an appropriate level of protection is to be determined by 'international standards': *S152/2003* at [27]. The Tribunal considers that by international standards, the UK undoubtedly has an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system. In reaching the conclusion the Tribunal has considered the US Department of State *Country Report on Human Rights Practices for 2013: United Kingdom*.
34. The Tribunal is satisfied that adequate and effective protection is available to the applicants against any perceived threat from [Applicant 1]'s family or community. The Tribunal finds the applicants could avail themselves of state protection in their country of nationality, the UK. Therefore, they are not refugees and do not satisfy the criterion set out in s.36(2)(a).

### **Complementary protection**

35. The Tribunal has also considered the application of s.36(2)(aa) to the applicants' circumstances. In this regard, the Tribunal has considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to a receiving country, the UK, there is a real risk they will suffer significant harm.
36. For the reasons given above, the Tribunal has concerns about the genuineness of the applicants claims to fear significant harm from [Applicant 1]'s family or the local Muslim Community. However, even if the Tribunal accepted there was a real risk of such harm, the Tribunal considers the applicants could obtain state protection. Under s.36(2B), there is taken not to be a real risk of significant harm if the non-citizen 'could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm': s.36(2B)(b). As noted above, the Tribunal considers the UK has an effective police force and considers the applicants could seek protection from the authorities in the UK. The Tribunal is satisfied the protection would reduce any risk such that it did not amount to a real risk of significant harm.
37. If the Tribunal is wrong on its assessment of the availability of state protection to remove the real risk of significant harm, then the Tribunal also considers relocation would be available to the applicants. Under s.36(2B), there is taken not to be a real risk of significant harm if 'it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm': s.36(2B)(a). The Tribunal considers the applicants could relocate within the UK to an area away from [Applicant 1]'s family. The Tribunal does not accept their assertion that nowhere would be



safe as they would be spotted by someone from the Muslim community. The Tribunal finds this farfetched, and does not accept [Applicant 1] is so recognisable that any Muslim in the UK would identify him. Moreover, there are many areas in the UK with small or negligible Muslim populations. The Muslim community in the UK is approximately 4.8% of the population and is concentrated in London and other large urban areas. The Muslim community in Scotland is 1.4% of the population, and there is no recorded Muslim community in Northern Ireland.<sup>2</sup> The Tribunal considers the applicants as educated citizens of the UK, could reasonably relocate, to an area without a Muslim population if they so desired.

38. The Tribunal has considered the applicants claims but is not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to a receiving country, that is the UK, that there is a real risk they will suffer significant harm. The applicants do not satisfy the requirements of s.36(2)(aa) of the Act.

### **Conclusion**

39. For the reasons given above the Tribunal is not satisfied that any of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

### **DECISION**

40. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

Carolyn Wilson  
Member

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<sup>2</sup> Information obtained from the United States Department of State *International Religious Freedom Report 2013: United Kingdom*.