1200203 [2012] RRTA 145 (6 March 2012)

DECISION RECORD

RRT CASE NUMBER:	1200203
DIAC REFERENCE(S):	CLF2011/199630
COUNTRY OF REFERENCE:	Japan
TRIBUNAL MEMBER:	Denise Connolly
DATE:	6 March 2012
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 and Citizenship 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 Japan and applied to the Department of Immigration and Citizenship for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] December 2011. The delegate decided to refuse to grant the visa [in] January 2012 and notified the applicant of the decision.

3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention

4. The applicant applied to the Tribunal [in] January 2012 for review of the delegate's decision.

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 applicant has 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. 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'

9. 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.

10. 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 and *Appellant S395/2002 v MIMA* (2003) 216 CLR 473.

11. 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.

12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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

19. The Tribunal has before it the Department's file relating to the applicant. 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.

20. The applicant first arrived in Australia [in] March 2010 as the holder of a Working Holiday visa valid until [March] 2011. He travelled on his Japanese passport. He departed Australia [in] March 2011 and returned [in] May 2011 as the holder of an Electronic Travel Authority (Visitor) visa which ceased [in] August 2011. The applicant was located by DIAC Compliance in August 2011 and granted a Bridging visa E which expired [in] August 2011 to make arrangements to depart. The applicant was subsequently located by DIAC Compliance and was detained [in] October 2011. There is a copy of the applicant's passport on the Department's file.

21. The applicant lodged his application for a protection visa [in] December 2011 and provided the following information:
    - He holds a Japanese passport.
    - He was born in [Osaka], Japan on [date deleted: s.431(2)].
    - He has never married and has no religion.
    - Prior to coming to Australia he worked as a [sport] instructor [in] (Okinawa). He has also worked [in hospitality] and [sport] assistant in Japan and Australia. He is a qualified [sport] master.
    - He received 13 years' education in Japan.
    - He has occasional contact with his mother who resides in Japan. His father is deceased. He has two [siblings] residing in Japan.

22. In a statement made [in] December 2011, the applicant made the following claims, in summary:

    - He is a citizen of Japan and he has no religion. He left Japan to travel on a working holiday in Australia, learn skills from Aboriginal people and improve his English.

    - He also left Japan because the authorities have not been honest with the people about the nuclear plants in Japan. His health has been poor and he believes the Japanese government's lack of concern about the air quality will continue to affect his health and shorten his life.

    - He believes if he returns to Japan he will face unprotected exposure to the radio-active environment and its effects on agriculture and the food he eats, the air quality and

ocean pollution. The government is not being honest about the effects of the nuclear power industry in Japan.

- He believes he is a member of a particular social group deprived of their human rights to good quality air, food and water in Japan.

- He believes if he returns to Japan he faces a real risk of serious harm to his health because the authorities refuse to warn people of the real dangers of nuclear radiation, especially now after the nuclear power leakage.

- He believes as a result of the March 2011 earthquake dangerous radiation levels will remain along the coast of Fukushima. He compares it to Chernobyl.

- Japan has 50 nuclear plants and is planning to build more. The plants pollute the oceans and rivers. The government is misleading the people concerning information about the dangers of radiation, radioactivity, and radioactive matter. The sea near Japan is contaminated by radioactive matter and he does not want to consume fish caught in Japan. The rain is also contaminated affecting rice fields and cattle feed.

- He has had allergies since he was [age deleted: s.431(2)]. His skin, sleep, concentration and mental health are affected. He has contemplated suicidal thoughts. Since arriving in Australia his health has improved. He concludes therefore that it is the level of contamination of the environment in Japan that led to his condition when he lived there.

- He does not believe the authorities in Japan will protect him because they are not being honest with Japanese people. They will continue to persecute the Japanese people as a group exposed to high levels of radiation. The government is persecuting them through inactivity and dishonesty regarding the lifelong dangers of nuclear planets and the effects of radiation to the environment. He believes if he returns to Japan he will be exposed to an even greater catastrophe through the government secrecy and dishonesty about the actual dangers of living near nuclear planets. He does not wish to eat anything produced in Japan or drink the water. He believes the environment has been poisoned even before the earthquake. The government will do nothing to protect him from radiation because it relies on radioactive nuclear energy.

- He does not believe that it matters where he lives in Japan, as he believes it is all affected by radiation pollution. There are 11 nuclear plants in the vicinity of Osaka and he believes the government has been secretive about the dangers from radiation. His family has never lived outside Japan so he would be obliged to return to Okinawa. He does not want to live a life suffering because of the effects of radiation. He fears the pollution of air, land and water by the authorities will reduce his life expectancy.

23. The applicant was interviewed by the delegate [in] December 2011. The Tribunal listened to the recording of the interview which is summarised, in part, in the delegate's decision record. When asked why he is a refugee he indicated he believed he met all five Convention grounds for the following reasons, in summary. As he is Japanese, born in Japan, he feels a victim of natural disasters and he has suffered because he lived there and his health was affected. He is not a Buddhist or Christian but his religion is that he trusted nuclear energy when he lived in Japan, and it was like a religion. He is a member of the particular social group that objects to living in a society with radiation in the air, due to the nuclear plants, and fears potential

cancers. He has a political opinion regarding his objection to there being more than 55 nuclear plants in Japan, lots of radiation and contamination.

24. The applicant said that he had a written statement based on his research of the nuclear plants in Japan. He indicated some are over 30 years old and this increases the risks.

25. The applicant indicated there have been many earthquakes in Japan which have caused major fear there and he feels as a human being he has a right to live in a safe environment.

26. When asked if he could return to Japan, the applicant said he cannot because all the food in Japan is contaminated and the government is making the citizens consume the food. The government is controlling the information and he expects many people will be affected by the accident in Fukushima.

27. When asked what will happen to him if he returns to Japan the applicant said he will be killed by the radiation and the government's actions. When asked what action will kill him he said there are 55 nuclear plants in Japan and the government has not decided to close them. When asked why this will kill him he said there is evidence that the food and fish in Japan are contaminated. Also the government does not know how to dispose of the contaminated soil. He said the government has not provided instructions for those living in the affected areas. It has not provided measures for those living in the local areas so why would they provide instructions for those living far away in Osaka where he lives.

28. The applicant said the government has been using nuclear plants as a nuclear weapon and killing people. He believes he will be killed. In the last 10-20 years there have been accidents not published and hidden by the government.

29. The delegate asked if the Japanese government had not been doing its best to assist the Japanese people through the crisis. The applicant said that is the information the government has been giving the people in Japan but the people from the affected area have not been able to move to new areas and they are suffering and slowly dying from the contaminated air.

30. The delegate put to the applicant that he was making an application for protection for environmental reasons. The applicant said it is also a political issue. The delegate indicated the protection visa was not designed for people fleeing environmental disasters but for people fleeing active persecution. The applicant said he understood but he feels he has a right to be protected. He feels the government is abusing nuclear power and affecting the lives of Japanese people. The delegate indicated it seemed the applicant was not being persecuted for one of the five grounds set out in the Convention definition The applicant said he has been suffering from an allergy partly caused by the radiation in the air. He could not continue to live in Japan. He could not attend school or work and suffered from mental health issues.

31. The delegate provided the applicant with an opportunity to discuss his claims with his representative. The applicant spoke with his representative privately and then emphasised to the delegate that he was applying for a protection visa because the government is using nuclear plants as a nuclear weapon to kill the people in Japan.

32. [In] January 2012 the delegate decided he was not satisfied the applicant is a person to whom Australia has protection obligations. The delegate accepted that equipment failures followed the catastrophic earthquake and tsunami of 11 March 2011. He accepted that there was a radioactive material released into the air and ocean and it was recognised as the worst nuclear

disaster since Chernobyl in 1986. However, he noted that the government has been dealing with the crises amid some criticism, both domestically and internationally. The delegate noted that while the applicant claimed the government would persecute him by encouraging him to eat food grown in Japan, and treat nuclear power plants as though they are weapons, he did not actually claim that the government is actively seeking to harm him by deliberately killing, detaining, maiming, injuring or otherwise harming him. The delegate did not accept the applicant claims amounted to serious harm.

33. The delegate did not accept that the applicant's claims fell within any of the grounds in the Convention. He considered the applicant's evidence indicates that the government is persecuting all Japanese and all Japanese nationals. He noted that Japan is a functioning democracy and the government works to serve the population. He did not accept the applicants claim to persecution on religious grounds. He noted the applicant indicated on his application form that he was of no religion. He did not accept that having a view about nuclear energy, either favourable or negative, constitutes a religion. He accepts the applicant now opposes the use of nuclear energy in Japanese society but he found there is no indication the applicant has been politically active. He noted there was no indication that the applicant had come to the adverse attention of the Japanese government because of a political opinion, real or imputed.

34. The delegate did not consider the applicant’s description of his group, those objecting to living in a society with radiation in the air and who live in fear, to be particular social group as recognised by the Convention or the Australian courts, as it is not a group that would be cognizable in Japanese society. He noted in his written claims he described himself as a member of a particular social group of people who are deprived of their human rights for good quality air, food and water in Japan. He did not consider this group could be cognizable in Japan as a particular social group as he considered it seemed to describe the entire Japanese population.

35. The delegate considered the applicant to be seeking environmental asylum on the basis that Japan has suffered a nuclear disaster which has led to the release of nuclear radiation into the environment, a deterioration of living conditions in certain parts of Japan and possible contamination of food, air and water in different parts of Japan, and this has led to an increase in medical problems. He noted that the nuclear disaster was an accident and not a deliberate act of the Japanese government against its people. He noted the use of nuclear energy and the safety of nuclear plants is a policy issue. He noted the Japanese government has taken steps to alleviate the suffering of affected people by evacuating towns and villages. He considered it likely the Japanese government will continue to take measures to address the issues. He did not accept that the Convention covers those seeking protection from environmental disasters, whether natural or man-made.

36. The delegate noted that the applicant is from Osaka which apparently has not been affected by any nuclear fallout. He noted the applicant’s claim that there are over 50 nuclear power plants and a similar incident could occur in the Osaka vicinity. He was not satisfied this would be the result of a deliberate policy to harm the Japanese people.

37. The delegate noted that the applicant claims to feel persecution in Japan because the food in Japan is contaminated by radiation and the government is encouraging the people to eat food produced in Japan. He claimed the government is using the nuclear plants like they are nuclear weapons and his exposure to radiation will result in his death. However, as he found

there is no Convention ground that is the essential and significant reason for the harm feared he did not assess whether the harm feared by the applicant amounted to persecution.

38. [In] January 2012 the applicant lodged his application for review with the Tribunal.

39. The applicant appeared before the Tribunal [in] February 2012 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Japanese and English languages. The applicant was represented in relation to the review by his registered migration agent. The following is a summary of the oral evidence provided at the hearing.

40. The applicant provided a 6 page document in Japanese, untranslated. The Tribunal indicated to the applicant that it would ask him to refer to the document as the information became relevant during the hearing and have it translated by the interpreter. It noted that there were pages of statistical data, and suggested this might be difficult for the interpreter to translate directly. The applicant agreed that he would discuss the content of the document while he was giving his evidence during the hearing.

41. The Tribunal requested that the interpreter translate the term "refugee" as it is defined in the Convention. The Tribunal then indicated to the applicant the key points in the definition and law that it would need to look at in making its decision as to whether he met the definition.

42. The applicant confirmed that he had completed his application for a protection visa with the assistance of his registered migration agent. He indicated that all of the information provided in the application form and the translated written statement is true. The applicant confirmed that everything he had said in his interview with the delegate was true. The Tribunal asked if he would like to make changes to his application and statement. He indicated that he would like to make additions during the hearing. He confirmed that he did not wish to make new claims, but rather provide more information about his existing claims.

43. The Tribunal asked the applicant about his background in Japan before coming to Australia. He indicated that he had lived in Osaka city with his family. However, prior to coming to Australia he had lived in Okinawa, where he worked as [sport] Assistant in the period July 2009 to February 2010. He confirmed that he received 13 years of formal education prior to commencing his employment. He has worked as a [sport] Instructor, a [sport] Assistant, and [in hospitality]. He confirmed that his family currently living in Osaka.

44. The Tribunal asked the applicant why he applied for a visa to come to Australia. He indicated that he intended to come here on a working holiday, as he had a strong desire to work on the Great Barrier Reef. He travelled to Australia on a working holiday visa and then after departing, he returned on a tourist visa. He indicated that when he was in Japan he had suffered badly from allergies. This was the reason he stopped attending university after one year. He consulted his doctors and decided to go overseas where the air is cleaner.

45. The applicant indicated that he had recently had blood tests relating to his allergies and the results would be available shortly. The applicant confirmed that he sought and received medical treatment from many doctors in Japan. However, he believed none were able to help him with his allergies. He claimed that he was unable to go outside his house for three years in the period 2001 to 2003. The Tribunal noted that the applicant's description of the education he received, included in his application, indicates that he was in fact attending high school in that period. It asked if it was true that he was not able to leave the house for a three

year period, and noted its concern that this might not have been the case. The applicant said he was only just able to finish his schooling. He said that after he commenced his university study, he was unable to continue because his whole body was festered for one year.

46. The Tribunal noted that the applicant has received training and is a [sport] Master. It asked when he received that training. He indicated he commenced the training when he was [age deleted: s.431(2)], in 2004. The Tribunal noted that that was the year after he ceased university and the year he claims that his whole body was festered. He made no comment.

47. The Tribunal asked the applicant about his employment in Australia since his arrival. He indicated that he first worked in Cairns and then he worked on Hamilton Island. He spent about one month practising his English on the Gold Coast before he commenced his employment in Cairns.

48. The Tribunal asked the applicant why he does not want to return to Japan. The applicant said that in March 2011 there was an earthquake and tsunami that resulted in the disaster at Fukushima. He said that the nuclear disaster reached level 7, which was the same level as the Chernobyl incident years before. He indicated that 25,000 lives were lost as a consequence. He said after the disaster the people of Japan have been forced to ingest contaminated food and water. He indicated he has bad allergies and as a consequence, he has suffered psychologically to the extent that he has contemplated suicide in the period 2001 to 2003 Since the disaster in Japan, his desire for good water and food has become stronger.

49. The applicant indicated that page 1 and 2 of the six page document he provided concern Greenpeace's research on contaminated food. He indicated that Greenpeace has listed foods that are still being sold in Japan which are contaminated.

50. The applicant referred to a map on the fourth page of the document he provided. He indicated the map shows the epicentres of earthquakes in the period 1963 to 1998. He indicated the map demonstrates that Japan has suffered numerous earthquakes in that period.

51. The Tribunal noted that it needed to consider whether the applicant genuinely feared persecution in Japan and if the persecution he fears involves serious harm. The Tribunal asked the applicant what he fears will happen to him if he returns to Japan. The applicant indicated that the accident at the nuclear plant in Japan led to a huge disaster affecting all Japanese. He said there are many more nuclear plants in Japan, approximately 55. He said there is no guarantee that he will be able to access safe air and water in Japan. He will be deprived of his liberty and as a result he will fall into a terrible psychological state.

52. The Tribunal noted that there is country information from the US Department of State on human rights in Japan[1], which indicates that there is respect for civil liberties, including freedom of speech and press, freedom of assembly, and freedom of religion in Japan. It questioned whether he would be deprived of his liberty if he returned to Japan. It noted that he was educated and employed in Japan and it appeared he enjoyed freedom of movement and was able to travel from Osaka to Okinawa to work as a [sport] Assistant. He was invited to comment. He said the Japanese politicians continue to push for nuclear power plants to be built. They do not intend to stop building the plants. In his view, this is persecution.

[1] US Department of State, 2010 Human Rights Report: Japan, http://www.state.gov/j/drl/rls/hrrpt/2010/eap/154386.htm accessed 16 February 2012

53. The Tribunal asked the applicant who it is he fears in Japan. The applicant indicated he fears the politicians because they promote building nuclear power plants. This results in the food being contaminated, and the authorities have not changed anything or done anything about it.

54. The Tribunal asked the applicant what harm he fears he will suffer if he returns to Japan. The applicant said there are power plants everywhere in Japan. He said there can be a nuclear accident in Japan at any time. He said that the workers in Japan have reported that there have been 300 cases of human error. He said that there is 30 tonnes of contaminated material being emitted into the ocean. He said there have been more than 400 earthquakes of a magnitude of five or above, and he fears further contamination of food and water. He said that the air and water in Japan are not safe. He has serious allergies which will be exacerbated by contaminated air and water, and this affects his psychological and physical well-being. He said he will be unable to sustain his life and function if he returns to Japan.

55. The Tribunal noted that the consequences of the earthquake and Fukushima accident have resulted in many people being affected but it did not appear to the Tribunal that the applicant would be particularly targeted by anyone or by the impact or consequences of such disasters, for a Convention reason. The applicant indicated that he would suffer more because he has serious allergies. He has contemplated suicide and his fears are well-founded. He said that the people who understand the impact of a nuclear disaster have left Japan.

56. The Tribunal asked the applicant why he fears harm as a consequence of the disasters and nuclear accidents indicating in order to meet the definition of refugee, the persecution that is feared has to be motivated by one or more of the five reasons set out in the definition. It asked the applicant why the persecution feared involves conduct that is systematic and discriminatory. The applicant indicated he wanted to have a break and did not want to answer the question immediately. The Tribunal noted that it would agree to a short break, but indicated that it would need to ask the same question at the resumption of the hearing.

57. When the hearing resumed, the applicant indicated that since he was [age deleted: s.431(2)] years old he has suffered from allergies. He said he has suffered under the threat of persecution. He had no liberty and does not enjoy the rights in Japan. The Tribunal noted its doubt about this as the applicant was able to work, received education, had access to medical services, and enjoyed freedom of movement. It indicated to the applicant that his evidence did not seem to demonstrate that he did not enjoy a right to live freely in Japan. The applicant indicated that if he returned to Japan, he did not think he could sustain his life safely, as the food and water are contaminated. He said that he believes there will definitely be more nuclear disasters. The Tribunal asked, even if it was the case that there were more disasters, why it would be that the applicant was being singled out or targeted by the authorities or politicians. He said this was because his constitution is such that he suffers more and he has contemplated suicide. He believes he has the basis for a well-founded fear of persecution.

58. The Tribunal asked the applicant when he first feared persecution in Japan. He indicated that his allergies started when he was about [age deleted: s.431(2)], and this was when he feared harm. The Tribunal asked why he did not apply for protection on his arrival in Australia, and only made the application after he was detained. He indicated he did not know about the visa. He said the Department's website is in English and he could not read it properly.

59. The Tribunal noted that the earthquake in Japan and the Fukushima accident were results of a natural disaster. It indicated that it did not appear that there had been any deliberate act by

government or politicians to harm the Japanese people, or a particular group in Japan, including the applicant. The applicant said that nuclear plants must be built to withstand earthquakes. However, the way they have been built they are not able to withstand earthquakes. He said that even before the disaster the politicians were saying the nuclear plants were safe. However, as a result of the plants not being built to withstand earthquakes, people have been harmed.

60. The Tribunal raised with the applicant again the issue of the Convention reason on which he intends to rely. It noted on his evidence, he does not appear to have been targeted for any particular reason. It appeared that the harm he might suffer in Japan as a consequence of another nuclear accident would be harm that everyone in Japan might suffer. The applicant said that Japan can supply itself with energy without relying on nuclear power plants. He believes that he would suffer as a consequence because the government maintains a policy of building nuclear power plants. He said in Japan it is not possible to live with safe air and water. He said he would not be able to sustain his life in Japan because he would not have access to safe food and water. He said that nuclear disasters will happen as a result of insufficient management by the government. He indicated that nuclear plants are supposed to be effectively safe for 10 years. He said many plants in Japan have been operating for more than 30 years. He believes that there will be more nuclear disasters. He said that a simple error can result in a catastrophic disaster. He indicated that he does not believe the Japanese government is able to manage its nuclear waste.

61. The Tribunal read to the applicant country information that indicates the situation in Japan, outside the precautionary zone (80 kilometres from the Fukushima nuclear plant), has returned to normal. It referred to information provided by the Department of Foreign Affairs indicating that it is safe to travel to Japan so long as a high degree of caution is exercised within 30 to 80 kilometres of the precautionary zone and travellers do not enter the 30 kilometre zone around the plant[2]. DFAT advised that it obtains information from the Australian Radiation Protection and Nuclear Safety Agency (ARPNSA)[3], which assesses the radiation levels in Tokyo and most parts of Japan, and indicates they are now within the normal range of variation of background radiation and are of minimal health consequence. DFAT notes that the Japanese authorities are restricting food from sale in a manner generally consistent with international guidance, and that the authorities make recommendations as to the safe consumption of food. DFAT also notes that the International Atomic Energy Agency (IAEA)[4] also provides information on the safety of food and water in Japan.

62. The Tribunal also noted that the United States government has indicated to its citizens that the situation in Japan is such that the risks may be higher for US citizens who reside within 80 kilometres of the Fukushima nuclear plant[5]. The US government recommends, '*out of an abundance of caution*', that US citizens who choose to reside for more than one year within 80 kilometres of the Fukushima nuclear plant consult the local authorities about any risk. It recommends that its citizens avoid the area within 30 kilometres of the Fukushima plant. It otherwise indicates that the situation in Japan has returned to normal.

---

[2] Department of Foreign Affairs and Trade, Travel advice for Japan, http://smartraveller.gov.au/zw-cgi/view/Advice/Japan accessed 16 February 2012

[3] Australian Radiation Protection and Nuclear Safety Agency, Media Releases, 22 December 2011, http://www.arpansa.gov.au/News/MediaReleases/japanadvisory.cfm accessed 16 February 2012

[4] International Atomic Energy Agency, Fukushima Daiichi Status Report, 27 January 2012, http://www.iaea.org/newscenter/focus/fukushima/statusreport270112.pdf accessed 16 February 2012

[5] US Department of State, Bureau of Consular Affairs, Travel Alert, Japan, 7 October 2011, http://www.travel.state.gov/travel/cis_pa_tw/pa/pa_5574.html accessed 16 February 2012

63. The Tribunal also noted that the IAEA provides lists of foods that have been contaminated, and indicates that food restrictions are openly reported by the Japanese authorities. The Tribunal asked the applicant if he had any comment to make on the country information which indicates that the Australian government and the US government are satisfied that their citizens can travel to Japan and by taking precautions, can remain relatively safe. The applicant indicated that Greenpeace Japan has published a list of foods that are contaminated. He indicated that they obtain those food samples from stores in Japan and contaminated food is still being distributed.

64. The Tribunal asked the applicant, even if contaminated food is still being sold in Japan, how is it the case that the applicant is being targeted for a Convention reason. The applicant said that human beings cannot sustain life without eating. He repeated that his allergies will deteriorate if he returns to Japan. He said that the fresh fish from the sea could be contaminated. He cannot check everything that is for sale and he will not be able to eat.

65. The Tribunal asked the applicant if he is known to any authorities in Japan. He indicated he is just an ordinary person. He confirmed he is not known to the authorities in Japan.

66. The Tribunal noted that the applicant had indicated to the delegate that he met the Convention definition for all five reasons set out in the definition. It asked if he could further explain why he believes he meets the definition on the basis of his race and nationality. The applicant indicated that he believes he meets this definition because Japan has a lot of earthquakes affecting all Japanese.

67. The Tribunal noted that he had indicated he thought he met the definition for reasons of religion. It asked if he could further explain why his religion is the reason he would be persecuted. The applicant said that he believes nuclear power has no place for the Japanese. He indicated he thought this was like a religion. The Tribunal suggested it might be a political opinion rather than a religion. The applicant agreed this was the case.

68. The Tribunal noted even if he had a political opinion on the issues raised the country information indicates that there is respect for freedom of speech and press in Japan, and the US Department of State is of the view that the government generally respects these rights in practice. It noted there is an independent press, an effective judiciary, and a functioning democratic political system which ensures freedom of speech. It asked why he thought his political opinion was the reason he would be persecuted if he returned to Japan. The applicant asked the Tribunal to give an example of persecution of a person for their political opinion. The Tribunal suggested an example to the applicant, emphasising that it was just an example and the details used to illustrate persecution were not a requirement to meet the definition. The applicant indicated that he then understood. He said if he returns to Japan he will not be able to freely obtain food or seek employment. He said he fears for his well-being, and he will not enjoy any rights. The Tribunal noted that the applicant appears to have enjoyed rights in Japan as he has been employed in the past, and the country information indicates that he will continue to enjoy those rights in Japan. It also noted the country information indicating that the Japanese government is making efforts to test food for contamination and restrict the distribution of contaminated food and to assist the Japanese people and evacuate those in danger[6]. The applicant said he believes Greenpeace's research is more reliable. He said they had undertaken individual checks on food and he trusts them

[6] Ministry of Health, Labour and Welfare, http://www.mhlw.go.jp/english/topics/2011eq/index.html accessed 16 February 2012

more than other sources. The Tribunal agreed to take into account his Greenpeace evidence, but suggested that it might decide to give more weight to the information provided by the Australian government, the US Department of State, the International Atomic Energy Agency, and the Japanese government. He indicated he preferred Greenpeace.

69. The Tribunal noted the applicant had given oral evidence about his health concerns. It asked, even if he is susceptible to the effects of radiation, whether there was evidence that his exposure and any consequences, is the result of him being deliberately singled out for a Convention reason. The applicant said that he is being persecuted because the air and food in Japan are contaminated. He said because of his allergies he will suffer more. He said the nuclear power plants will affect his well-being.

70. The Tribunal noted that the delegate had indicated that the applicant was in fact seeking environmental asylum. It asked if he had any comment to make. He said that he believes he is a political refugee because the politicians are pushing to create an environment where the food and air are contaminated. He said, as a result, his life and liberty are threatened.

71. The Tribunal asked the applicant to comment on a suggestion that his fear of future nuclear disaster might be considered speculative. The applicant said that there will be many disasters in Japan and he will not be able to sustain his life because of his allergies. He said that any future generations will have their lives threatened by future disasters.

72. The Tribunal noted that the applicant had not provided medical evidence to indicate that he is more susceptible to the effects of radiation because of his allergies. It noted, however, that even if he produced such evidence, it did not appear that there was evidence that he was being singled out for a Convention reason. The applicant repeated he is more susceptible because of his allergies. He believes that he is being harmed by the politician's policies.

73. The Tribunal noted that the applicant might not meet the definition of refugee, as it had not seen evidence that the harm the applicant feared was for one or more of the Convention reasons. It asked if the applicant had any final comments to make on its concern. The applicant indicated that in view of his past experience, nuclear disasters and nuclear power plants are the cause of the threat to his life. He said that people with allergies are more affected by those circumstances. He believes that the government is targeting allergic people.

74. The Tribunal asked the applicant if he wished for the interpreter to translate anything else in the document he had provided. The applicant referred to page 6 of the document, which included figures regarding nuclear waste. He said that the politicians have no idea what to do with the waste. He said the contamination affects his psychological and physical well-being.

75. The applicant confirmed that page 2 and page 3 of the document he provided concern Greenpeace's research on contaminated food in Japan. He indicated that page 5 confirms that there are many nuclear power plants in Japan.

76. The Tribunal noted that the applicant had indicated he had lived in Okinawa. It asked how far Okinawa is from Fukushima. The applicant thought it was about 1,500 kilometres away. He confirmed that he had worked there before he came to Australia. The Tribunal indicated that it thought he might be able to return to Okinawa and could work there as a [sport] Master. It also noted his family are in Osaka, which is about 500 kilometres from Fukushima. It noted there was no evidence that the applicant would be forced to return to the Fukushima area. The applicant confirmed that this was the case However, he said that there

are nuclear power plants everywhere in Japan. He said he would not be able to sustain his life in Japan because there is no clean food or water. He said he is anxious for his future, his safety and well-being. If he went back to Japan, he fears his allergies will return and this will affect his psychological and physical well-being and he will contemplate suicide. The Tribunal put to the applicant that it had not seen evidence that he could not consult the medical profession in the future. He indicated that he has consulted doctors in Japan but his conditions have not improved and he fears his condition will get worse. He acknowledged Australians are not being discouraged from travelling to Japan as tourists, and he confirmed that people are still diving in the Okinawa area. However, he believes his physical condition makes it difficult for him, as his conditions might get worse if he has to live in Japan. He said there is no guarantee of safe water, air and food in Okinawa.

77. The Tribunal asked the applicant if he had any other evidence he wished to give. He confirmed that he had no other evidence.

78. The Tribunal invited the applicant's migration agent to make submissions. The migration agent indicated that the applicant has undergone medical tests recently and the results should be available in two days. The Tribunal asked if the medical tests addressed the Tribunal's issue of concern relating to the Convention reason. The migration agent said that the medical evidence did not address that issue. The applicant indicated he believes that the medical tests' results will address that issue. The Tribunal agreed to postpone making its decision until after close of business [in] February 2012.

79. [In] February 2012 the applicant provided the results of pathology tests indicating he is allergic to house mite, mite mix, mould mix and animal epithelial mix (such as cat and dog). The report records a history of atopic dermatitis.

FINDINGS AND REASONS

80. On the basis of the applicant's passport provided to the Department the Tribunal accepts the applicant is a citizen of Japan and his claims will be assessed against that country.

81. The applicant claims to fear harm in Japan because he has physical and psychological medical conditions that will be exacerbated by the contaminated air, food and water in Japan. He claims the authorities are doing nothing to control the distribution of contaminated food, are forcing the Japanese to consume contaminated food, and they are not being honest with the Japanese people about the effects of the nuclear power industry in Japan. He claims there will be more catastrophic events associated with nuclear power plants in the future and the government is doing nothing to avoid this, it cannot manage the nuclear waste, and despite this it intends to build more nuclear plants. He claims he has no liberty and does not enjoy rights in Japan. He claims he will be killed by radiation and the government's actions. He claims the government is persecuting the Japanese people and using nuclear plants as nuclear weapons and killing people. He claims he objects to living in a society with radiation.

82. The Tribunal accepts the applicant has concerns about returning to Japan, particularly since the earthquake resulting in the Fukushima accident. However, for the reasons set out below, the Tribunal is not satisfied that the applicant has established that he would face serious harm for a Convention reason if he were to return to Japan in the reasonably foreseeable future.

83. When asked about the reasons the applicant feared persecution in Japan, he indicated he believes he meets the Convention definition on the basis of race and nationality because

Japan has a lot of earthquakes affecting all Japanese. The Tribunal accepts that it might be that the applicant might be seriously harmed by a natural disaster such as an earthquake in the future if he were to return to Japan. However the Tribunal is not satisfied the applicant will suffer serious harm, which is systematic and discriminatory, on the basis of his race or nationality. It is not satisfied on the basis of the applicant's evidence that any harm he might suffer as a consequence of an earthquake would have an official quality or be tolerated officially. The Tribunal is satisfied on the basis of the independent information that the Japanese authorities have taken significant steps to assist those affected by earthquakes. It has not seen evidence that the applicant would be deprived of such assistance in the future if he were to be affected by an earthquake in Japan. The Tribunal does not accept the applicant will be persecuted on the basis of his race or nationality if he were to return to Japan.

84. Based on the medical evidence he provided, the Tribunal accepts the applicant has allergies which affect his skin. He indicated his condition was so bad in the past that he could not complete university however the Tribunal notes he also indicated the year that he finished university was the year he commenced his diving training. He indicated he did not leave his house for three years in the period 2001 to 2003 but in his protection visa application he indicated he attended high school in that period. On the basis of those inconsistencies, put to the applicant, the Tribunal formed the view, in his oral evidence, the applicant embellished the extent and impact of his medical conditions. Despite this the Tribunal is willing to accept the applicant fears his medical conditions might be exacerbated by returning to Japan. The applicant suggested he is a person who is more susceptible to the effects of radiation because of allergies. The Tribunal has considered his claims on the Convention ground of being a member of a particular social group, those people whose allergies make them more susceptible to the effects of radiation.

85. The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A's* case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

> … First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". …

86. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be for reasons of the person's membership of the particular social group.

87. Before a decision can be made that a person is a refugee by reason of his or her membership of a particular social group, the Tribunal must be satisfied that:

- there is a relevant social group of which the applicant is a member, and
- the persecution feared is for reasons of membership of the group.

88. The Tribunal has not seen medical evidence that the applicant will be more susceptible to radiation because of his allergies if he were to return to Japan. The only medical evidence the Tribunal has seen about the applicant's conditions is confirmation that he has allergic reactions to various other substances. He asserts his conditions are worse in Japan but the Tribunal has some concerns about the applicant embellishing his evidence about his medical conditions. In any case, even if the Tribunal were to accept it is possible the applicant's conditions might be exacerbated by exposure to radiation in Japan, the Tribunal is not satisfied people whose allergies make them more susceptible to the effects of radiation form a particular social group, as the characteristic or attribute common to all members of the group, exacerbated allergy, is, in this case, the shared fear. Also the harm feared by merely having exacerbated allergies does not involve conduct of a systematic and discriminatory nature. Even if the Tribunal is wrong and the group he describes is a particular social group, there is no independent evidence before the Tribunal to indicate people in the group he describes are intentionally exposed to greater levels of radiation or deprived of appropriate medical attention. The applicant's own evidence indicates he will have access to medical treatment as he had seen several doctors in the past The Tribunal has not seen evidence to indicate the applicant will be deprived of adequate medical treatment if his allergies are exacerbated by the conditions in Japan.

89. More generally the applicant has indicated he is a member of a particular social group, people with allergies in Japan. He has indicated he fears severe reaction caused by nuclear fallout. The Tribunal accepts this could be serious harm and his membership of the group could be the essential and significant reason he will suffer that harm. It accepts the conduct leading to the harm is the government's nuclear energy policy and this could be considered systemic. However the government's conduct is not discriminatory in that it is targeted at the population generally, not at the applicant as a member of the particular social group, people with allergies in Japan. Therefore while the applicant may suffer serious harm it will not be persecution as it is missing a discriminatory motivation by the Japanese government.

90. The Tribunal has also considered the applicant's submission that he is a member of a particular social group in Japan, being those deprived of their human rights to good quality air, food and water. The Tribunal has not seen evidence that there is such a group in Japan which is specifically targeted and forced to access different air, food and water to any other group in Japan. It seems to the Tribunal that the applicant is describing all Japanese citizens. There is no evidence the applicant has been, or will be, discriminated against in relation to his access to air, food and water. The Tribunal is not satisfied there is such a group in Japan, identifiable by a characteristic or attribute common to all members of the group, possessing characteristics or attributes which distinguish the group from society. The Tribunal is not satisfied there is such a relevant group of which the applicant is a member.

91. The Tribunal has also considered the applicant's submission that he is a member of a particular social group in Japan, which objects to living in a society with radiation in the air, due to the nuclear plants, and fears potential cancers. The Tribunal is of the view the applicant is describing a group who share a political view about Japan's energy and nuclear policies, rather than a particular social group. It does not accept that members of this group are identifiable by a characteristic or attribute common to all members of the group, possessing characteristics or attributes which distinguish the group from society. It is not satisfied there is such a relevant group of which the applicant is a member. It formed the view it is more appropriate to consider this group as a group holding a political opinion.

92. The Tribunal accepts the applicant is opposed to Japan's reliance on nuclear energy and that he disagrees with the government's policies on that reliance and on any possible future development of more nuclear power plants. The applicant suggested this position was like a religion but he ultimately agreed that he holds a political opinion on this issue. The Tribunal has considered whether there is a real chance the applicant will be persecuted because of his political opinion if he were to return to Japan. The country information indicates the Japanese government and laws provide for freedom of speech, there is an independent press, effective judiciary and a functioning democratic system. The applicant has not given any evidence indicating the conduct he intends to engage in if he returns to Japan. However even if he is openly politically active, the Tribunal has not seen any evidence to suggest the applicant will suffer serious harm as a consequence of his political opinion. The Tribunal is satisfied on the basis of the country information that even if the applicant were to publicly express his political views on nuclear energy in Japan he would not suffer persecution.

93. The Tribunal concluded that even if a positive or negative view about nuclear power should be considered as a religion, there is no evidence that the applicant would suffer harm as a consequence of his religion, if he were to return to Japan in the foreseeable future.

94. The applicant claims he will be deprived of his liberty and rights in Japan. However on his own evidence he has been educated and adequately employed in Japan, he has enjoyed freedom of movement, having lived and worked in Osaka and in Okinawa and he has had access to medical treatment. There is no evidence to indicate he would not enjoy freedom of movement, except it might not be appropriate for him to live or work within the precautionary zone around the Fukushima site. There is also no evidence that he would be deprived of the opportunity to secure gainful employment if he were to return to Japan in the foreseeable future. On his own evidence he is not known to the authorities and there is nothing to indicate he will come to the adverse attention of the authorities in Japan which might result in the deprivation of his liberty and rights. The Tribunal does not accept the applicant will be deprived of his liberty and rights if he were to return to Japan in the foreseeable future.

95. The applicant claims he will be killed by radiation and the government's actions if he returns to Japan. He claims the government is using nuclear plants as nuclear weapons and killing people. The Tribunal has seen country information from both DFAT and the US Department of State indicating the Australian and US governments believe it is safe for their citizens to travel to, and reside in, Japan so long as precaution is taken when travelling near the precautionary zone. The Tribunal has not seen independent information to support the applicant's view that the government is using nuclear plants as nuclear weapons and killing people. It formed the view this reflects the applicant's political opinion about Japan's reliance on nuclear energy. However even if it was the case that the Japanese government was intentionally allowing its people to be harmed by its adoption of this energy form, the Tribunal has not seen reliable evidence that the applicant might be harmed in this way for a Convention reason or as the result of discriminatory conduct. The Tribunal is satisfied that the impact of any nuclear disaster will affect all Japanese in the given area affected. There does not appear to be any reliable evidence that the applicant will be targeted for holding a political opinion about nuclear energy or for any other reason. There is no evidence before the Tribunal to indicate the consequence of any nuclear disaster and the harm suffered will be systematic and discriminatory.

96. The applicant claims he will not be able to eat if he returns to Japan as the food and water are contaminated. He claims the government is forcing its citizens to consume contaminated

food. The Tribunal does not accept this claim. It has considered the independent information provided by DFAT, US Department of State, the ARPNSA, the IAEA and the Japanese Ministry for Health, Labour and Welfare and it is satisfied the Japanese government is making significant efforts to avoid the distribution of contaminated food. It has taken into account the applicant's contrary submissions and his evidence from Greenpeace indicating otherwise. However the Tribunal was persuaded by the wealth of evidence from those other agencies supporting the view that the Japanese government is endeavoring to protect its citizens from ingesting contaminated food and water. The Tribunal is not satisfied the applicant would be forced to ingest contaminated food or water if he were to return to Japan in the foreseeable future.

97. The applicant has submitted the Japanese government is not able to manage its nuclear waste, it does not manage its nuclear power plants effectively and its old power plants are at risk. He believes as a consequence he will suffer harm. The Tribunal has not seen independent information to support the applicant's assertions. However even if the applicant is correct, there is no evidence before the Tribunal that a catastrophic consequence of these circumstances is intended to target and harm the applicant for a Convention reason. There is no evidence the applicant might suffer harm as the result of discriminatory conduct in relation to this claim.

98. The Tribunal has considered whether all of the applicant's circumstances combined – people with allergies, including those whose allergies might be exacerbated by radiation, who have a political opinion opposing the government's adoption of nuclear energy - form a particular social group. The Tribunal considers, from the applicant's evidence, the harm feared as a result of these circumstances would be the deterioration of his physical and psychological wellbeing. The Tribunal does not accept that the characteristic which binds this group is not and does not constitute a shared fear. The Tribunal is satisfied that, even if this group constitutes a particular social group, there is no evidence that this group would be targeted and suffer harm as a consequence of discriminatory conduct essentially because of the combination of these circumstances. The Tribunal has not identified any independent information which confirms that the harm he fears would be the result of systematic and discriminatory conduct because of his membership of this group. There is no evidence that the group members are persecuted because they are perceived to be an easy target. The Tribunal accepts the applicant's evidence that he would have access to medical treatment and there is no evidence it would be denied to him because of his membership of this group. The Tribunal knows of no reason why state protection would be withheld from the applicant, if he were to participate in any lawful conduct associated with this group. It finds that there is no real chance that the applicant will face serious harm were he to return to Japan now or in the reasonably foreseeable future due to membership of this group.

99. The applicant has claimed he will suffer various types of harm including exacerbated allergies, not having access to clean air, food and water and being deprived of his liberty and rights. He has claimed he will suffer harm for a variety of reasons as a result of the Japanese government's conduct including its nuclear power policies and regulation, its dissemination of information and its crisis management, all of which might be seen as systematic. He identifies the persecutor as the Japanese government. In order for there to be Convention persecution the persecutor must be engaging in discriminatory conduct. Even if the Japanese government is guilty of the conduct claimed, Japan is a functioning democracy and the conduct relates to the governing of Japan. The conduct which the applicant claims will result in harm is not aimed at the applicant, or anyone in particular, but at governing Japan. The

conduct is not discriminatory and any harm suffered as a consequence will not be persecution. Regardless of the harm being considered, as a consequence of governance, it will not be for a Convention reason.

100. Accordingly, having regard to all the evidence, and the applicant's claims individually and cumulatively, the Tribunal does not accept that if the applicant returns to Japan now or in the reasonably foreseeable future, he will be persecuted for any Convention reason.

CONCLUSIONS

101. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

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