

1511528 (Refugee) [2016] AATA 4034 (22 June 2016)

DECISION RECORD

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| DIVISION: | Migration & Refugee Division |
| CASE NUMBER: | 1511528 |
| COUNTRY OF REFERENCE: | Malaysia |
| MEMBER: | Sophia Panagiotidis |
| DATE: | 22 June 2016 |
| PLACE OF DECISION: | Melbourne |
| DECISION: | The Tribunal affirms the decision not to grant the applicants protection visas. |

Statement made on 22 June 2016 at 1:53pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 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 [in] August 2015 to refuse to grant the applicants protection visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants, who claim to be citizens of Malaysia, applied for the visas [in] March 2015.

Background

3. The primary review applicant and her husband, the second named applicant arrived in Australia [in] January 2015 after having been granted a [temporary] visa [in] January 2015. This visa ended [in] April 2015.
4. Their [child] was born in Australia on [date] and is not a party to this application.
5. The applicants' claims in the application for the visa were essentially that they left Malaysia because the primary review applicant's family did not approve of his relationship with the second named applicant. The relationship caused arguments between the families. The applicants stated they moved in with the primary review applicant's family but the relationship between the families remained fraught and in response to the question whether they thought they would be harmed or mistreated if they returned, the applicants stated they would because the quarrels between the families would continue and this may led to divorce as the second named applicant's family does not like his wife and she will be beaten by his family and injured. In response to the question as to whether the authorities can or will protect them, the applicants responded that the police were more concerned with crime. In response to the question as to whether they would be able to relocate within their country, the applicants responded that they could go to other family members.

The delegate's decision

6. The delegate had a number of concerns about the applicants' claims. She noted that information provided in the application for the visa indicated that the primary review applicant's family were deceased and so it was unclear whether he has any family in Malaysia to "beat and injure" his wife as claimed. The delegate was also concerned that the claims made by the applicants were vague and lacking in detail and they had provided no corroborative evidence to support their claims. The delegate noted that the primary review applicant had indicated they can relocate to another area within Malaysia and be with other family members. The delegate was also concerned as to why the applicants had waited for over two months before they submitted an application for a protection visa and why neither applicant tried to leave Malaysia prior to January 2015 if they were issued with passports in [month] 2014.
7. The delegate considered the applicants may have submitted their application for a protection visa in order to delay their department and not because of a genuine fear of persecution or significant harm if they return to Malaysia.

CRITERIA FOR A PROTECTION VISA

8. 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, he or she 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 of the same class.

9. 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 because the person is a refugee.
10. A person is a refugee if, in the case of a person who has a nationality, they are outside the country of their nationality and, owing to a well-founded fear of persecution, are unable or unwilling to avail themselves of the protection of that country: s.5H(1)(a). In the case of a person without a nationality, they are a refugee if they are outside the country of their former habitual residence and, owing to a well-founded fear of persecution, are unable or unwilling to return to that country: s.5H(1)(b).
11. Under s.5J(1), a person has a well-founded fear of persecution if they fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, there is a real chance they would be persecuted for one or more of those reasons, and the real chance of persecution relates to all areas of the relevant country. Additional requirements relating to a 'well-founded fear of persecution' and circumstances in which a person will be taken not to have such a fear are set out in ss.5J(2)-(6) and ss.5K-LA, which are extracted in the attachment to this decision.
12. 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 the 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 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'). The meaning of significant harm, and the circumstances in which a person will be taken not to face a real risk of significant harm, are set out in ss.36(2A) and (2B), which are extracted in the attachment to this decision.

The hearing

13. During the hearing held on 21 June 2016 the Tribunal asked each of the applicants a number of questions in order to clarify their particular situation. The applicants indicated they had not completed the application for the visa themselves and had help. They paid someone to complete the form. They confirmed that their [child] was born in Australia on [date].
14. Both applicants confirmed they were born in Malaysia and provided their dates of birth which was consistent with the information previously provided to the Department. Both applicants confirmed they were living [in] Malaysia prior to coming to Australia. They both confirmed they met when they were [ages] as students at secondary school and they both attended the same university and had both completed a degree in [course] as well as a diploma in [course]. They were married [in] 2014 and the Tribunal notes they have provided a marriage certificate as evidence of this.
15. The primary review applicant told the Tribunal he had been working in [occupation] for an [certain] company in [City 1] prior to coming to Australia. The second named applicant had been working in [occupation] for a [different] company until she came to Australia. They both confirmed they had no problems in leaving Malaysia and had applied for the visitor visa through a travel agent.
16. Both applicants told the Tribunal they have no family in Australia and all their family live in Malaysia. The primary review applicant's family consists of his father, [other family members]

and they are living in Kuala Lumpur. He indicated that the information in the application for the protection visa indicating that they are deceased is not correct. They are alive and well and living in Malaysia. His father is a [occupation] and his [family member] is in [occupation]. He has a [sibling] who is [age] and who does not work. His mother passed away when he was [age] and he does not have a cordial relationship with his [family member].

17. The second named applicant confirmed her parents live in and she has [siblings]. Her father is a [occupation] for a [certain] company, [some siblings] are also in similar occupations and [another sibling] is still in school. Her mother does not work.
18. The primary review applicant told the Tribunal that his family did not accept the relationship with his wife. He was asked whether there was a reason for this and he said there was no definite reason. Before their marriage in 2013 he asked his father for permission to marry the second named applicant. At that time, his father considered he was too young to marry and he told his father that he was working and was able to support himself and his family. His father would not accept this. He met with his wife's family and they decided to discuss things with his family. A meeting was arranged through relatives but his family would not accept the marriage. The primary review applicant said that they decided to get married anyway. He said that even after they had married his family did not accept the relationship. His relationship with his father has broken down which has caused him a great deal of distress and anxiety.
19. The primary review applicant was asked why he could not live with his wife's family and he told the Tribunal that traditionally he would be expected to take his wife to live with his family. When there was a discussion between the two families, it became a confrontation and his wife's family were embarrassed at what had happened. Because of the shame his family has brought on his wife's family, they decided to leave. They wanted to explore the possibility of living in Australia away from all the trouble. They met someone who advised them to apply for a protection visa. They were not advised of any other visa options.
20. The primary review applicant was asked what harm he fears if he returns to Malaysia. He said that because his family does not accept his decisions and his relationship he feels pressure and cannot work or concentrate because of his distress. His father, who does not know the address of his wife's family sent a letter to them for him, supposedly for the Eid celebration and stated he will not forgive him. He told the Tribunal that it will be difficult to live in Malaysia because of the emotional interference in their lives. He believes his father does not approve of his relationship with his wife, because her family does not have as high a status as his.
21. The applicants were asked if there had been any physical violence towards them, particularly towards the second named applicant. Both applicants indicated that there had not been.
22. The second named applicant told the Tribunal that her family has been forced to accept their relationship. When the families met, her [relative] told her family that they were not suitable for his son. Her [other relatives] were the main ones who were involved in negotiating the meeting in order to arrange the marriage. Her husband's [other relative] was also involved. Her husband's family essentially insulted them and shamed them; however, in the end her family has accepted the relationship. She told the Tribunal she considers the letter sent to her husband for Eid is like a threat. Her [relative] managed to get the letter to her family despite not having their address and knew they would give it to her and her husband. This letter is like an announcement that her [relative] still does not approve and will continue to put pressure on his son. She believes they may have chosen someone else for him to marry.

23. The primary review applicant was asked if his father is capable of violence. He told the Tribunal that his father is not violent and will not resort to physical violence; however he may continue to put pressure on his to leave his wife. He said he has not spoken directly to his family since 2014 but they know where he and his wife are.
24. The primary review applicant told the Tribunal he is working in a [certain] factory. The second named applicant is not currently working as she is looking after their baby. They have been visited by the second named applicant's family recently.

Mandatory considerations

25. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal has taken 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 relevant country information assessments 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.

CONSIDERATION OF CLAIMS AND EVIDENCE

26. The issues in this review are whether the applicant has a well-founded fear of being persecuted for one or more of the five reasons set out in s.5J(1) and if not, whether there are substantial grounds for believing that as a necessary and foreseeable consequence of him being removed from Australia to his receiving country of Malaysia, there is a real risk that he will suffer significant harm.
27. The Tribunal has carefully considered the claims made by the applicant's and accepts their evidence that they have married in opposition to the primary review applicant's family. The Tribunal accepts that this has caused both applicants extreme distress as the primary review applicant's family has still not accepted their relationship. The second named applicant's family, in spite of their having been embarrassed by the primary review applicant's family have accepted the relationship. The Tribunal accepts that although the decision to leave Malaysia entirely may have been precipitous, the applicants decided to leave the country in order to avoid further problems by the primary review applicant's family. They did not make any enquiries before leaving as to what options may have been available for them to migrate to Australia through conventional means. In light of their educational qualifications and work experience there may have been other options open to them. The Tribunal also accepts that they received poor advice to make an application for a protection visa given their circumstances and were not advised of other visa options.
28. While the Tribunal accepts that the applicants, particularly the primary review applicant remains distressed about his family's attitude towards his wife and their reluctance to accept his relationship, on the available evidence the Tribunal is not satisfied that the applicants have a well-founded fear of being persecuted, if they returned to Malaysia for reasons of their race, religion, nationality, membership of a particular social group or political opinion. Further the Tribunal is not satisfied that if the applicants were to return to Malaysia there is a real chance they would be persecuted for those reasons. The applicants have also indicated they could live in an area other than where the primary review applicant's family lives in order to avoid any further confrontation and they do not fear that his family will take any steps towards harming them. The evidence before the Tribunal is that the second named applicant's family has accepted their relationship and therefore they would have some family support on return to Malaysia.

29. Having regard to the evidence before it, the Tribunal does not accept the applicants faces a real chance of serious harm for any reason set out in s5J of the Act. Consequently, the tribunal is not satisfied that the applicant has a well-founded fear of persecution as set out in s5J of the Act. The Tribunal finds that the applicants are refugees within the meaning of s5H of the Act.
30. For the reasons given above, the Tribunal is not satisfied that each of the applicants is a person in respect of whom Australia has protection obligations under s.36(2)(a).
31. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa).
32. Having regard to the evidence before it, the Tribunal is also not satisfied that there are substantial grounds for believing that there is a real risk that the applicants will suffer significant harm as a necessary and foreseeable consequence of being removed to Malaysia.
33. The Tribunal is not satisfied that each of the applicants is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
34. 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), and cannot be granted the visa.

DECISION

35. The Tribunal affirms the decision not to grant the applicants protection visas.

Sophia Panagiotidis
Member

ATTACHMENT - Extract from *Migration Act 1958*

5 (1) Interpretation

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.
Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.
Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in them practice of his or her faith;
 - (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;

- (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
- (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of serious harm for the purposes of that paragraph:
- (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a well-founded fear of persecution for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or
 - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;
 where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
- (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or
 - (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
- (a) the person can access the protection; and

- (b) the protection is durable; and
- (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

..

36 Protection visas – criteria provided for by this Act

...

(2A) A non-citizen will suffer *significant harm* if:

- (a) the non-citizen will be arbitrarily deprived of his or her life; or
- (b) the death penalty will be carried out on the non-citizen; or
- (c) the non-citizen will be subjected to torture; or
- (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
- (e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

- (a) 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; or
- (b) 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; or
- (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...