

1514798 (Refugee) [2016] AATA 3892 (30 May 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1514798
COUNTRY OF REFERENCE:	Malaysia
MEMBER:	David Corrigan
DATE:	30 May 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a protection visa.

Statement made on 30 May 2016 at 3:44pm

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] October 2015 to refuse to grant the applicant a protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Malaysia, applied for the visa [in] July 2015.

CRITERIA FOR A PROTECTION VISA

3. 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.
4. 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.
5. 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).
6. 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.
7. 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.

Mandatory considerations

8. 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

9. The applicant's claims can be summarised as follows. He was born in [year] in Kuala Lumpur, Malaysia. He arrived in Australia in May 2015 on a visitor visa that allowed a three month stay in Australia. He is a Hindu and Tamil. He owes money to loan sharks. They bashed and scolded him for not repaying his debt. They damaged his car, house, bike and phone and threatened to kill him. He has lost his important agreement so he supposes he cannot report the matter to the police. The police do not normally protect them and they say you need to settle your loan shark problem yourself. He sought help at the local police station and a bank officer at [name] branch. He moved home to his parent's home but the loan sharks easily found him by bribing the authorities. He has also been denied employment because of his racial background. He also fears the police because he told them he would take the matter further.
10. The applicant has claimed in a statutory declaration, dated [in] May 2016, that he is gay and fears harm on that basis. He attached copies of pass-outs from two gay saunas in [city].

Country of reference

11. The applicant claims to be a Malaysian national. Based on the copy of his passport, I find that Malaysia is his country of nationality and also his receiving country for the purposes of s.5(1) and s.36(2)(aa) of the Act.

Assessment of claims

12. I have carefully the applicant's claims but I do not consider him a credible witness. I do so for the following reasons:
 - The applicant gave significantly and fundamentally inconsistent evidence on an important matter. The applicant told the Tribunal that he did not go to the police as he knew this would make the situation worse and that they would have to be bribed and that they were on the side of the loan sharks. However, this is inconsistent with his statement in his protection visa application (f.21 D) that he did seek the help of the police at [suburb] Kuala Lumpur Branch (Inspector [name]). When this was put to him, he then stated that this man was a Constable who asked him why he wanted to go against them. I have considered his response, however it does explain why he has given such inconsistent evidence and I do not accept that the applicant would not be able to consistently recall if he had sought the help of the police and I find this detracts from his credibility.
 - The applicant told the Tribunal that he was physically hit by the money lenders on seven separate occasions. Asked why he would not go to the police as he had claimed, he said he did not have proof and didn't know what to do. In his statutory declaration, he said it was because it was common practice for the loan sharks to bribe them. I have considered the country information (including internet articles and YouTube videos) he has submitted concerning the police in Malaysia, however I have given greater weight to the advice of the Australian Department of Foreign Affairs and Trade (DFAT) who have stated that whilst the quality of Malaysian police responses varies depending on levels of training, capacity or engagement in corruption, credible local and international sources consider the Malaysian police to

be a professional and effective police force.¹ I have given considerable weight to this source as it is authoritative, recent and they have been charged with the provision of advice to the Australian government. Furthermore, a range of country information indicates that Malaysian police have taken action against loan sharks in recent years.² I have considered his explanations for not going to the police but I do not consider it plausible or credible that the applicant would not have sought the assistance of the police given this country information and the level and frequency of harm that he says he experienced and I find this detracts from his credibility.

- The applicant has claimed that he has known he was gay since he was about [age] and that and that he had a physical relationship with a man when he was [age] and that when he was [age] he had a two year relationship with another man who he loved. He states not long after he arrived in [city] he started attending a gay bar and made some gay friends. He said he had an intimate relationship with a man that lasted two months and that he is now sharing a flat with a gay man who he likes. However, he made no mention of these claims in either his protection visa application or his first hearing with the Tribunal. The applicant in his statutory declaration stated that he did not raise this claim in his application because he was scared of the authorities, had little money and was on the run and did know he could convince the authorities that he was gay. I do not accept this explanation. I told the applicant early in the first hearing that the hearing was closed to the public and he should feel fully free to tell me why he thought he was a refugee or entitled to complimentary protection. Later in the hearing, I asked the applicant if anything else had happened since he left Malaysia that makes him further concerned for his safety and he did not refer to his claimed homosexuality. Near the end of the hearing I gave him another opportunity to tell me anything else about his case that I should take into account and he again did not refer to his claimed homosexuality. The applicant told the Tribunal in the second hearing that he did not mention this matter in the first hearing because the interpreter was female and Malaysian. However, the applicant was told early in that first hearing that the interpreter was obliged not to repeat outside the hearing room anything that was said and I do not consider it plausible or credible that the applicant would not have raised this matter either in his protection visa application or his first hearing with the Tribunal if he actually was gay. I find this significantly detracts from his credibility.
- At the hearing, I asked the applicant whether he went to any gay bars or saunas in Malaysia and he said that he went to only normal ones because there were no gay bars in Malaysia. However, as I put to him, independent country information shows that there exists many gay bars in Kuala Lumpur³ and I do not accept it credible that if the applicant was gay and had a two year gay relationship in Kuala Lumpur that he would be completely unaware of this and I find it further detracts from his credibility.

¹ Department of Foreign Affairs and Trade, DFAT Country Report Malaysia, 3 December 2014.

² See for example, 'Malacca police investigates 29 Ah long cases since January' 2013, *Malaysia Edition*, 28 December <http://www.malaysiaedition.net/malacca-police-investigates-29-ah-long-cases-since-january/>; 'Police Free Man Abducted By Loan Sharks', 2014, *Malaysian Digest*, 16 October <http://www.malaysiandigest.com/news/523345-police-free-man-abducted-by-loan-sharks.html>; 'Loan sharks caught red-handed' 2015, *The Star Malaysia*, 29 May <http://www.pressreader.com/malaysia/the-star-malaysia/20150529/281749857954168/TextView>; 'Police cooperate with Council to wipe out loan sharks' 2013, *Daily Express*, 28 December <http://www.dailyexpress.com.my/news/.cfm?NewsID=87641>; Tan, S C 2014, 'Crackdown on Ah Long', *The Star Online*, 25 April <http://www.thestar.com.my/News/Community/2014/04/25/Crackdown-on-Ah-Long-Police-launch-operation-to-curb-illegal-moneylending/>.

³ See for example, The Gay Passport, <http://thegaypassport.com/gay-kuala-lumpur/best-gay-bars-kl/> and Utopia Asia, <http://www.utopia-asia.com/klbars.htm>.

13. Given these highly significant concerns about his credibility, I do not accept that the applicant owes money to loan sharks. I do not accept that they bashed and scolded him for not repaying his debt. I do not accept he moved to his parent's home but the loan sharks easily found him by bribing the authorities. I do not accept that he also fears the police because he told them he would take the matter further. I do not accept that he is of adverse interest to loan sharks, the police or anyone else.
14. Given these highly significant concerns about his credibility, I do not accept that the applicant is a homosexual or that he has ever been in any gay relationship in Malaysia or Australia or that he will wish to engage in homosexual activities upon his return to Malaysia. The applicant has presented pass-outs from two gay saunas in [city], but these do not overcome the highly significant concerns set out above that I have about his credibility.
15. The applicant has submitted a number of internet articles and YouTube videos on the conduct of loan sharks and copies of photos he says show injuries caused to him by the loan sharks. I have considered these documents; however they do not overcome the highly significant concerns I have about his credibility that are set out above.
16. The applicant submitted a letter from a friend of his in Malaysia who had worked with the applicant in a bar from 2011. This friend also gave oral evidence by the telephone to the Tribunal. The friend supported the applicant's claims that he had borrowed money from a loan shark for his [sibling]'s wedding and had not repaid it. The friend's evidence was that the applicant had been physically harmed by the loan sharks because of this including on one occasion (when the friend was not present) at the bar. I have taken into account this evidence; however given the highly significant concerns I have about the applicant's credibility set out above I have not given this evidence any weight in making my assessment.
17. The applicant has also submitted a letter from [name] who states that he has known the applicant for three months and can confirm that he is a homosexual. He states that the applicant is an honest and reliable person and he understands that the applicant has been living as homosexual since he was [age]. I have taken into account this evidence; however given the highly significant concerns I have about the applicant's credibility set out above I have not given this evidence any weight in making my assessment.
18. The applicant has presented evidence that he has been prescribed [medication for specific medical conditions]. He has stated that he began to see a GP because of the symptoms of stress including headaches and shaking and that he has been referred to a [professional]. He has submitted a report from a [professional], dated [in] May 2016, which states, inter alia, that the applicant reported depressive symptoms in the context of being beaten and tortured due to not paying money back to a loan shark. It states that the applicant reported [multiple medical impairments]. It is stated that he [overdosed on prescription medication] in the context of the issues of the loan shark. It is also stated that he identifies as a homosexual and that his partner is in Malaysia and that his family are unaware of his sexuality. It is stated that he had the impression of Trauma and Stressor related Disorder (Subsyndromal Post traumatic stress disorder) and mild [impairment]. It is stated that the applicant has been prescribed [(an anti-depressant)] and a prescription of it was submitted. I note the psychiatrist's assessment of the applicant was based on just one visit by the applicant and does not purport to be a diagnosis of his conditions. I have considered the contents of this report carefully and I accept that based on this report and the prescriptions that the applicant has some mental health issues. I have taken this into account in making my findings, however it is not sufficient to overcome the highly significant concerns that I have about his credibility that are set out above.
19. The applicant attended two Tribunal hearings and was able to participate fully in both and answer questions and present his case. I am satisfied that he was given a real and

meaningful opportunity to give evidence and present arguments in a manner consistent with s.425 of the Act.

20. An authoritative and recent source (put to the applicant for comment at hearing), the Australian Department of Foreign Affairs and Trade (DFAT) have commented:
- 3.10 Indians constitute the third largest ethnic group in Malaysia. There are no laws or constitutional provisions that directly discriminate against ethnic Indians.
- ...
- 3.14 DFAT assesses that ethnic Indians generally do not experience discrimination or violence on a day-to-day basis. However, they may face low levels of discrimination when attempting to gain entry into the state tertiary system or the civil service.⁴
21. The applicant told the Tribunal that his salary was never correct and seemed less and that Malays had a lot of entitlements and the Chinese were wealthy. I have considered his comments concerning Malays, but the applicant told the Tribunal he worked as a [occupation] in Malaysia and in his statutory declaration he stated he worked as a [occupation] both of which shows he was able to earn a livelihood. The applicant told the Tribunal that he had seen a Tamil man murdered in 2015 but he did not know why he had been murdered. He said there were lots of gangs around. Even if I accept that the applicant saw a Tamil man murdered, on his own evidence, he is not aware of the motivation for that man's death and the applicant did not provide any evidence of how such an incident was relevant to him or would lead to him being targeted for his Tamil ethnicity or any other reason. Whilst I accept that there is some low level of discrimination against Indian Tamils, I do not consider the available country information or his individual circumstances indicates that the applicant as an Indian Tamil would face serious harm or significant harm in Malaysia is anything more than remote.
22. Considering the country information and the applicant's individual circumstances on a cumulative basis, I find there is not a real chance that in the reasonably foreseeable future he would be persecuted for any reason (including race, religion, nationality, membership of a particular social group or political opinion). His fear of persecution is not well-founded as required by s.5J of the Act and therefore he is not a refugee within the meaning of s.5H.
23. Considering the country information and the applicant's individual circumstances on a cumulative basis, I find that there are not substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Malaysia that there is a real risk that he will suffer significant harm.

Conclusions

24. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(a).
25. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
26. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

⁴ Department of Foreign Affairs and Trade, DFAT Country Report Malaysia, 3 December 2014.

DECISION

27. The Tribunal affirms the decision not to grant the applicant a protection visa.

David Corrigan
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.

...