

1501754 (Refugee) [2016] AATA 3927 (3 June 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1501754
COUNTRY OF REFERENCE:	Italy
MEMBER:	Carolyn Wilson
DATE:	3 June 2016
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal affirms the decision not to grant the applicants Protection visas.

Statement made on 03 June 2016 at 3:20pm

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 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 Italy applied for the visas [in] December 2013 and the delegate refused to grant the visas [in] January 2015.
3. The applicants appeared before the Tribunal on 6 May 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the [applicant's son]. The Tribunal hearing was conducted with the assistance of an interpreter in the Italian and English languages.

RELEVANT LAW

4. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
6. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
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 a protection visa if he or she is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
8. Subsection 36(2) of the Act, which refers to persons in respect of whom Australia has protection obligations, is qualified by subsections 36(3), (4), (5) and (5A) of the Act. They provide as follows:

Protection obligations

(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

9. This means that where a non-citizen in Australia has a right to enter and reside in a third country, Australia will not have protection obligations in respect of that person if he or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4), (5) or (5A) are satisfied, in which case the s.36(3) preclusion will not apply.
10. The Full Federal Court in *MIMAC v SZRHU* [2013] FCAFC 91, has held that the term 'right' in s.36(3) should not be restricted to a right in the strict sense which is legally enforceable. Rather, it should include the notion of liberty, permission or privilege lawfully given, albeit capable of withdrawal and not capable of enforcement; or a liberty, permission or privilege which does not give rise to any particular correlative duty upon the state in question.
11. In determining whether these provisions apply, relevant considerations include: whether the applicant has a liberty, permission or privilege lawfully to enter and reside in a third country either temporarily or permanently; whether he or she has taken all possible steps to avail himself or herself of that right; and whether s.36(3) does not apply because of the operation of s.36(4), (5) or (5A).
12. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for

protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Claims

14. The applicants are wife and husband. They were both born in [another country], but have been long term residents in Italy and have Italian citizenship. They arrived in Australia in July 2013 as holders of [temporary] visas. Their adult son travelled with them. He was subsequently granted a [temporary] visa.
15. The applicants claim they left Italy in fear of their lives. In July 2010 the first named applicant witnessed child sexual abuse at [an agency's] aged and child care facility where she worked as [an occupation]. She raised the incident with one of the [officials] who told her not to repeat the allegation to anyone. The next day she lost her job. She told mothers of the children in care of what she had witnessed, and they removed their children. As a consequence she claims to have suffered ongoing harassment in the form of threatening calls. The applicants claim to have reported the harassment to police three times, but no action was taken. In November 2010 the second named applicant was physically attacked at work and warned his son would be harmed if he went to the police. They applicants moved in October 2011 from [Town 1 to Town 2]. The threatening calls continued. In April 2013 the applicant was attacked at home when her husband and son were out. Two people broke in and assaulted her. They threatened to kill her and harm her son if she reported the assault to the police. The family made arrangements to move to avoid further harm and decided they would be safer in Australia.

Delegate's decision

16. The delegate refused the application on the basis the applicants were citizens of the European Union and could access third country protection. The delegate found the applicants had not taken all possible steps to avail themselves of their right to enter and reside in a country apart from Australia, where they would not have a well-founded fear of persecution or face a real risk of significant harm or have a well-founded fear of refoulement from that country.

Assessment against refugee criterion

17. The applicants do not claim to meet the refugee criterion, but made their application on the basis they met the complementary protection criterion. The Tribunal considers this concession was properly made. There is no claim that they fear harm for reason of their race, religion, nationality, membership of a particular social group or political opinion, There is no claim that protection by the Italian authorities is being withheld for reason of their race, religion, nationality, membership of a particular social group or political opinion, The basis of their claim was one of criminal retribution for the first named applicant having witnessed and told mothers of sexual abuse in [an agency's] facility.
18. On the material before it, the Tribunal finds the applicants do not meet s.36(2)(a) as it finds there is not a well-founded fear of persecution for a Convention reason. However, in the event there is an allegation the Tribunal has failed to deal with a claim to meet the refugee criterion, the Tribunal relies on its findings below in relation to s.36(3) to (5A).

Assessment against complementary protection criterion

19. The Tribunal has considered whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to a receiving country, there is a real risk that they will suffer significant harm.
20. The applicants assert they cannot return to Italy, as they claim they will be harassed as they were before and face a real risk of significant harm. If the Tribunal were to accept the applicant's faced a real risk of significant harm in their home area, this would still be qualified by the exceptions in s.36(2B). That is there would not be taken to be a real risk if it were reasonable for the applicants to relocate to an area of the country where there not be a real risk or where they could obtain protection from the authorities. However, the Tribunal has not found it necessary to make findings on whether the applicants face a real risk of significant harm in Italy as it has decided, for the reasons given below, that the applicants cannot meet s.36(2) because s.36(3) applies.

Third Country Protection and s.36(3)

21. The Tribunal has considered this application against s.36(3) on the hypothesis that s.36(2) may apply.
22. The qualification in s.36(3) provides that Australia is taken not to have protection obligations to non-citizens who have not taken all possible steps to avail themselves of a right to enter and reside in a country apart from Australia. There are exceptions to this qualification which operate, broadly, where a person has a well-founded fear of being persecuted or faces a real risk of significant harm in that country, or has a well-founded fear of *refoulement* from that country to a place where they face such treatment.¹
23. The statutory qualification to Australia's protection obligations under s.36(2) was introduced to address circumstances where it was considered protection was available in a country other than Australia.² The introduction of s.36(3) and related provisions were aimed at ensuring 'that only those who most need [Australia's] assistance - those with no other country to turn to are able to enter [Australia's] protection system'.³ Although s.36(3) was initially introduced as a qualification to the 'refugee' criterion in s.36(2), the introduction of 'complementary protection' grounds as an alternative basis for the grant of a protection visa means that the statutory proviso in s.36(3) applies equally to qualify the operation of s.36(2)(aa).
24. Section 36(3) requires a right to enter and reside in another country. The Tribunal relies on information obtained from the official website of the European Union (www.europa.eu) which provides the following information on the right to residence in other European countries:

During the first 3 months of your stay in your new country, as EU national, you cannot be required to apply for a residence document confirming your right to live there - although in some countries you may have to report your presence upon arrival.

After 3 months in your new country, you may be required to register your residence with the relevant authority (often the town hall or local police station), and to be issued with a residence document.

¹ Subsections 36(4) – (5A).

² Introduced by the *Border Protection Legislation Amendment Act 1999* (No.160 of 1999).

³ Commonwealth, *Parliamentary Debates*, Senate, 25 November 1999, 10668-9 (Kay Patterson, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs).

You will need a valid identity card or passport and:

- Employees / Postings abroad
 - Certificate of employment or confirmation of recruitment from your employer
- Self-employed
 - Proof of your status as self-employed
- Pensioners
 - Proof of comprehensive health insurance
 - Proof you can support yourself without needing income support: resources may come from any source
- Students
 - Proof of enrolment at an approved educational establishment
 - Proof of comprehensive health insurance
 - Declaration that you have sufficient resources to support yourself without needing income support: resources may come from any source

You do not need to provide any other documents.

When you register, you will get a registration certificate. This certificate confirms your right to live in your new country.⁴

25. However, a number of European Union countries do not even require registration in order for other European Union citizens to reside or work. For example, there is no need to register for Sweden, France or the United Kingdom⁵.
26. The Tribunal is satisfied that under European Union legislation the applicants have the right to enter and reside in other member states of the European Union for at least three months and longer. The Tribunal finds the applicants have not taken all available steps to avail themselves of the right to enter and reside in countries such as Sweden, France or the United Kingdom, or any of the remaining European Union member states where they have the right to establish residence. The Tribunal finds that s.36(3) applies.
27. Subsections (4)(a) and (5) of s.36 respectively provide that subsection (3) does not apply in relation to a country:
 - if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
 - if the non-citizen has a well-founded fear that:
 - the country will return the non-citizen to another country; and
 - the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.
28. There is no claim and nothing to indicate the applicants have a well-founded fear of persecution for a Convention reason in any of the European Union countries. Nor is there anything to indicate they could be returned to a country where they would face persecution for a Convention reason.

⁴ http://europa.eu/youreurope/citizens/residence/documents-formalities/registering-residence/index_en.htm

⁵ http://europa.eu/youreurope/citizens/residence/documents-formalities/registering-residence/uk/index_en.htm

29. Subsection (4)(b) and (5A) provide a similar qualification to s.36(3) on complementary protection grounds. Under these provisions, s.36(3) does not apply if:
- the Minister has substantial grounds for believing that as a necessary and foreseeable consequence of the non-citizen availing him or herself of the right to enter and reside another country ('the third country'), there would be a real risk of the non-citizen suffering significant harm; or
 - the non-citizen has a well-founded fear that that the third country will return him or her to another country in respect of which there are substantial grounds for believing that there is a real risk the non-citizen will suffer significant harm (as a necessary and foreseeable consequence of availing him or herself to the right to enter and reside in *the third country*).
30. The Tribunal finds there is not a well-founded fear that the third country would return the applicants to Italy, given their right to enter and reside as European citizens. The Tribunal acknowledges European Union citizens may be expelled by their new country on grounds of public policy or public security, but only in cases of very serious threat.⁶ The Tribunal does not consider this would apply to the applicants, and finds the chance of them being returned is too remote to amount to a well-founded fear.
31. The applicants contend relocation within Europe will not ensure their safety as they moved before and the harassment and physical attacks still occurred. The Tribunal notes however the move from [Town 1 to Town 2] was a move of only [amount] kilometres to a neighbouring town. The applicants' son submitted at hearing and in written submissions that s.36(3) does not apply because the applicants will face a real risk of significant harm in any European country they may enter, as it is easy for those wishing to harm them to get to them. He makes this claim on the basis of the ease with which citizens of the European Union can drive between member countries, cross borders with weapons in their cars, and take cheap flights.
32. The Tribunal finds it too remote and mere speculation that persons from their home area in Italy will be aware of and ready and able to travel to any new address in another European Union country to inflict significant harm. It has been three years since the applicants left Italy, and there is no evidence of ongoing harassment or harm. There is no evidence persons in Italy are aware of their residence in Australia. There is no claim that threatening phone calls have been made to them in Australia. The Tribunal notes evidence of the father's business and the family's address and phone number (in the White Pages) are publicly available on the internet, so should persons in Italy be interested in searching for them in Australia they would have been able to find them. The Tribunal acknowledges the claim their son's girlfriend in Italy has continued to be asked where the family are living. If this has occurred, the Tribunal considers it is opportunistic harassment rather than evidence of efforts to track them down. Whilst the girlfriend travelled to Australia for [number] months to be with the son, no-one appears to have connected her travel with visiting the son. There is no claim or evidence persons in Italy have discovered the family moved to Australia through any harassment of the girlfriend.
33. The Tribunal finds it remote and mere speculation that persons in Italy wishing to harm them would be aware if the applicants moved back to Europe and resettled in another European Union country. There are 27 other countries within the European Union, apart from Italy, and the Tribunal finds it implausible that the applicants would be discovered and face a real risk of significant harm wherever they might choose to go within the European Union.

⁶ http://europa.eu/youreurope/citizens/residence/work-pensioner/rights-conditions/index_en.htm

34. The Tribunal finds there are not substantial grounds for believing that as a necessary and foreseeable consequence of the applicants availing themselves of the right to enter and reside another European Union country there would be a real risk of them suffering significant harm. Given the evidence referred to above on the operation of the European Union, the Tribunal also finds there is not a well-founded fear that another European Union country would return them to Italy or another country where there are substantial grounds for believing there is a real risk or significant harm. Therefore, as found above, the Tribunal finds s.36(3) applies such that Australia does not have protection obligations in respect of the applicants.

Conclusion

35. For the reasons given above and pursuant to s.36(3) the Tribunal is not satisfied that any of the applicants is a person in respect of whom Australia has protection obligations. The applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

DECISION

36. The Tribunal affirms the decision not to grant the applicants Protection visas.

Carolyn Wilson
Member