

1603640 (Refugee) [2016] AATA 4347 (30 August 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division
CASE NUMBER: 1603640
COUNTRY OF REFERENCE: Malaysia
MEMBER: Glen Cranwell
DATE: 30 August 2016
PLACE OF DECISION: Brisbane
DECISION: The Tribunal affirms the decision not to grant the applicant a protection visa.

Statement made on 30 August 2016 at 1:17pm

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] February 2016 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] October 2015. The delegate refused to grant the visa [in] February 2016.
3. The applicant appeared before the Tribunal on 30 August 2016 to give evidence and present arguments.

CRITERIA FOR A PROTECTION VISA

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, 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.
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 because the person is a refugee.
6. 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).
7. 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.
8. 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

9. 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

10. At the hearing, the applicant confirmed that she is currently [age]. She also confirmed the information contained in the protection visa application form that she worked as a [occupation] from 2011 to 2015.
11. The Tribunal asked the applicant what other occupations she has undertaken. The applicant stated that her main occupation was [that stated occupation]. She is sometimes fearful in this employment as a she is a female. She has also operated a business [of a certain type]. When she was younger, she worked in a factory.
12. The Tribunal asked the applicant whether she has ever been unemployed. The applicant stated that if she did not work, she would have nothing to eat.
13. The Tribunal asked the applicant whether she lived alone. She stated that she did.
14. The Tribunal asked the applicant when she arrived in Australia. The applicant stated that she arrived in Australia [in] January 2015 as the holder of a [type of] visa that was valid for 3 months.
15. The Tribunal asked the applicant what she did between [date] April 2015, when her [type of] visa expired, and [date] October 2015 when she lodged her protection visa application. The applicant stated that she did not do much. She went along with her friend.
16. The Tribunal asked the applicant why she did not apply for a protection visa earlier. The applicant stated that she was unaware and ignorant.
17. The Tribunal asked the applicant how she filled in her protection visa application. She stated that she completed the form with the assistance of her friend, who spoke both Malay and English.
18. The Tribunal asked the applicant whether the form set out all of her claims. The applicant stated that it did.
19. The Tribunal asked the applicant what she feared if she returned to Malaysia. The applicant stated that she owes a lot of money to people, and would be in big trouble. She is also of an age where working is more difficult.
20. The Tribunal asked the applicant to tell it about the money she borrowed. The applicant stated that she ran a [business]. A lot of her customers did not pay. It escalated to bankruptcy. She came to Australia with her friend.
21. The Tribunal noted that the applicant had not listed the [business] on the employment history page of her protection visa application. The applicant stated that she did not know she had to write that. It was a business [of a certain type].

22. The Tribunal noted that the applicant had not listed her claimed fear arising from borrowing money on her protection visa application form. The applicant stated she wrote it in Malay. Her friend translated it into English. She cannot read English.
23. The Tribunal asked the applicant whether she had the document on which she wrote out her claims in Malay. The applicant stated that she did not know. She gave her friend the form.
24. The Tribunal put to the applicant that the claims on her protection visa application form related to her being of Bugis ethnicity. She did not mention borrowed money or her age on her protection visa application form, just as she did not mention her Bugis ethnicity at the hearing. The applicant stated that it was true that she was Bugis.
25. The Tribunal asked what she feared on account of being a Bugis person. The applicant stated that it is difficult to get employment.
26. The Tribunal put to the applicant that she had given evidence that she had never been unemployed. The applicant stated that was true, but she does not like to [work] at night as a female [occupation].
27. The Tribunal asked the applicant what she feared due to her age. The applicant stated that it was difficult to get employment if you are old.
28. The Tribunal put to the applicant that [age] was not particularly old. The applicant stated that she feels it is.
29. The Tribunal put a number of concerns to the applicant. Firstly, the Tribunal stated that it might have expected her to have lodged a protection visa application considerably in advance of when she did, if she had the fears she claimed. Alternatively, it might have expected her to at least made inquiries as to how she could remain lawfully in Australia before her [type of] visa expired if she was concerned about returning to Malaysia. The applicant stated that she was completely ignorant, and only knew after her friend told her.
30. Secondly, the Tribunal stated that it might have expected her to raise her claims about borrowed money in her protection visa application, and her failure to do so might cause the Tribunal to doubt the credibility of those claims. The applicant stated that she had no comment.
31. Thirdly, the Tribunal stated that it might have doubts about her claims to be discriminated against because she is a Bugis person, when her evidence was that she had been employed her whole life. The applicant stated that she had no comment.
32. Fourthly, the Tribunal stated that it might have doubts about her ability to obtain employment at [age], noting in particular that that would be no imposition to continuing work as a [occupation]. The applicant stated that she had no comment.
33. The Tribunal asked whether the applicant wishes to raise any other issues. The applicant stated that she is appealing to the Australian government to allow her to stay. She wants to apply for a work visa and seek employment.

Assessment

34. The applicant claims to be a Malaysian national. In the absence of evidence to the contrary, the Tribunal finds that Malaysia is her country of nationality and also her receiving country for the purposes of s.5(1) and s.36(2)(aa) of the Act.

35. The Tribunal does not accept that the applicant is at risk of serious harm or significant harm (as those terms are defined in s. 5J(5) and s.36(2A), respectively) on account of her Bugis ethnicity. While the applicant stated in her protection visa application that Bugis people are mistreated and discriminated against by the government, and not accepted by local people, the only particular that the applicant was able to raise at the hearing was that Bugis people are discriminated against in obtaining employment. This claim is inconsistent with the applicant's own work history, which is that she has been employed her whole life. Even if the applicant does not wish to [work] at night as a female [occupation], a position no doubt shared by many female [occupation] in Australia, she has clearly been able to earn a sufficient income to subsist for her entire adult life.
36. The Tribunal does not accept that the applicant is at risk of serious harm or significant harm on account of her age. The applicant is only [age]. She indicated that she wished to obtain work in Australia, which indicates that she is fit to work. There is no evidence before the Tribunal to suggest that she would be unable to continue work as a [occupation] given her age, or obtain other employment in Malaysia.
37. The Tribunal does not accept that that the applicant has debts in Malaysia, or that she is at risk of serious harm or significant harm on account of those debts. The Tribunal basis its finding in this regard on three factors:
- The applicant did not raise issues relating to debts in the protection visa application form. When asked early in the hearing, the applicant stated that the protection visa form set out all her claims. The applicant claimed to have written down those claims in Malay. However, the applicant was unable to provide the Tribunal with any document where she had written those claims down in Malay. Further, the Tribunal considers it implausible that the applicant's friend would have translated her claims of being a Bugis person, which the applicant did not consider sufficiently important to raise herself at the hearing, but then leave out more substantive claims relating to debts.
 - The applicant claims that her debts arose from a [business]. However, she did not mention such a business on her protection visa application form. Although the applicant stated that she did not know she had to mention such a business, question 85 clearly asks for such details as part of her employment history.
 - The applicant also delayed nearly nine months after her entry in Australia, and nearly six months after she became unlawful, before lodging a protection visa application. Even if the applicant was unaware she could apply for a protection visa, the Tribunal would at the very least have expected her to make inquiries as to how she could lawfully remain in Australia before her [type of] visa expired if she was concerned about returning to Malaysia. The applicant's failure to do so suggests to the Tribunal she does not have the fears claimed.
38. After considering all the evidence the Tribunal is unable to satisfy itself that the applicant has a well-founded fear of persecution for one of the reasons mentioned in s.5J(1)(a) or that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Malaysia, there is a real risk that she will suffer significant harm.

CONCLUSIONS

39. 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).

40. 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).
41. 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).

DECISION

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

Glen Cranwell
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.

...