

1505935 (Refugee) [2015] AATA 3526 (15 October 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1505935
COUNTRY OF REFERENCE:	Malaysia
MEMBER:	Stuart Webb
DATE:	15 October 2015
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 15 October 2015 at 9:26am

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 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 2014 and the delegate refused to grant the visa [in] April 2015.
3. On 18 September 2015 the Tribunal wrote to the applicant advising that it had considered all the material before it relating to the application but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing on 14 October 2015. The applicant was advised that if he did not attend the hearing and a postponement was not granted, the Tribunal may make a decision without further notice. No response was received. On [two dates in] October 2015 the Tribunal sent the applicant an SMS reminder of the hearing date to the phone number provided with his application. The applicant did not appear before the Tribunal on the day and at the time and place of the scheduled hearing. In these circumstances, and pursuant to s.426A of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before it.
4. The applicant provided the Tribunal with a copy of the delegate's decision.

RELEVANT LAW

5. 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.

Refugee criterion

6. 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).
7. 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.
8. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the Regulations to a particular person.

9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
11. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
13. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
14. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
15. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

16. 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').

17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

19. 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

20. The applicant made the following claims in his application. He borrowed money to buy a motorcycle. They demanded he pay high interest and he could not afford the repayments. They asked him to do illegal things. They threatened to kill him. He was detained and tortured. He fears gangs. He reported it to the police, but the police detained him and tortured him. The police receive money from the gangs and will help persecute him.
21. He is an unmarried Chinese from Melaka. He lived at the same address all his life till coming to Australia. He came to Australia [in] March 2014, his 3 month visa expiring [in] June 2014. He remained in Australia. [In] October 2014 he applied for his protection visa. He did not attend an interview with the department.
22. The delegate accepted the applicant was a Malaysian citizen based on his passport that he provided. The delegate considered that the applicant's claims were vague limited and had serious doubts regarding their authenticity.

Findings

Country of nationality

23. The applicant claims to be a citizen of Malaysia, and has provided a biodata page of his Malaysian passport to the department. The Tribunal finds that the applicant is a citizen of Malaysia, that Malaysia is the applicant's country of nationality for the purposes of the Refugees Convention, and that Malaysia is his receiving country for the purposes of complementary protection.

Third country protection

24. There is no evidence before me to suggest that the applicant has the right to enter and reside in any safe third country for the purposes of s.36(3) of the Act.

Credibility

25. The Tribunal is aware of the importance of adopting a reasonable approach in the finding of credibility. In *Minister for Immigration and Ethnic Affairs and McIlhatton v Guo Wei Rong and Pam Run Juan* (1996) 40 ALD 445 the Full Federal Court made comments on determining credibility. The Tribunal notes in particular the cautionary note sounded by Foster J at 482:

...care must be taken that an over-stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted.

26. The Tribunal also accepts that 'if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. (The United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1992 at para 196). However, the Handbook also states (at para 203):

The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.

27. When assessing claims made by applicants the Tribunal needs to make findings of fact in relation to those claims. This usually involves an assessment of the credibility of the applicants. When doing so it is important to bear in mind the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims.
28. The Tribunal must bear in mind that if it makes an adverse finding in relation to a material claim made by the applicant but is unable to make that finding with confidence it must proceed to assess the claim on the basis that it might possibly be true (see *MIMA v Rajalingam* (1999) 93 FCR 220).
29. However, the Tribunal is not required to accept uncritically any or all of the allegations made by an applicant. Further, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out. (see *Randhawa v MILGEA* (1994) 52 FCR 437 at 451 per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.)
30. The Tribunal invited the applicant to a hearing as his claims were vague and limited. He had not taken up the opportunity to discuss his claims with the Department, to provide further information about his claims. He did not attend the Tribunal to discuss these claims.
31. The Tribunal has significant concerns regarding the claims of the applicant. Had the applicant attended the hearing, the Tribunal would have questioned him about his involvement with 'underground friends' who lent him money to buy a motorcycle. The Tribunal would have asked him about the amount of money owed and why he had an inability to repay whatever amount was owed. The Tribunal would have discussed his ability to purchase a trip to Australia when he was also stating that he was unable to repay an amount owed for his motorcycle. The Tribunal would have discussed this with the applicant, had he attended the hearing. He did not, so the Tribunal has been unable to allay its concerns regarding this element of the applicant's claims.

32. The applicant has claimed that he was asked to do illegal things by the gang. The applicant has not provided any information about what illegal actions he was asked to do. Had the applicant attended, the Tribunal would have discussed this element of his claims and the concerns held by the Tribunal on this claim.
33. The applicant claimed he was detained and tortured by the criminal gang. Again, he has not provided any information about this claim. Had the applicant attended the hearing, the Tribunal would have discussed this with the applicant, including seeking details about the harm he received, who held him, for how long, where, and how he was able to get away from such mistreatment. As his claim stands, it is a vague and limited expression of harm with no detail whatsoever.
34. The applicant has claimed that he tried to report to police to seek protection but the police detained him and tortured him. the applicant claimed that the gang have connections with police and the authorities. Had the applicant attended the hearing, the Tribunal would have discussed with the applicant why the authorities would seek to detain then torture him because he was seeking to make a complaint about criminal activities. The Tribunal would have asked for more information about when this occurred, how long he was held, what happened and how he was released from police custody, if he was being held and tortured as claimed. The Tribunal would have asked questions about the applicants claims the police and authorities were involved with the criminal interests, how he knew of these connections, whether he had spoken to anyone else about these connections and why the police and authorities would assist the criminal gang to persecute the applicant, who, as he claimed, just owed money to them, and refused to do illegal acts for them. The Tribunal would have asked questions why the authorities would seek to persecute the applicant in this situation.
35. The applicant has not attended the hearing with the Tribunal to provide more information about his claims, where he was advised in the hearing notice that the Tribunal had considered all the material before it relating to the application but it was unable to make a favourable decision on that information alone. The applicant's claims are vague and very limited, with very little detail regarding the overall situation that has led to his fearing harm at the hands of criminals and police. As stated above, the Tribunal is not required to accept uncritically any or all of the allegations made by an applicant, and the failure of the applicant to attend the Tribunal hearing, and the departmental interview before that, and vague and limited claims as provided, leads to the Tribunal to have significant credibility concerns about the claims of the applicant.
36. On the basis of the very limited evidence before it, the Tribunal is not satisfied that the applicant has in the past experienced harm from a criminal gang or the Malaysian police or the Malaysian authorities more generally, or that he was detained or tortured by any group. On the information available to it the Tribunal does not accept that the applicant has a genuine subjective fear of serious harm from a criminal gang or the Malaysian police or the Malaysian authorities more generally. On the evidence before it, the Tribunal does not accept there to be a real chance that the applicant faces serious harm if he returns to Malaysia, now or in the reasonably foreseeable future.
37. Having considered the applicant's claims, the Tribunal finds that there is no real chance that the applicant will face persecution for any of the Convention reasons if he returns to Malaysia now or in the reasonably foreseeable future. The Tribunal finds that the applicant does not have a well-founded fear of persecution for a Convention reason. 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 the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

38. The Tribunal also considered whether the applicant meets the complementary protection criterion under s.36(2)(aa). The Tribunal has considered whether it 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 the applicant will suffer significant harm.
39. For the reasons set out above, the Tribunal has not accepted there to be a real chance that the applicant faces serious harm from a criminal gang or the Malaysian police or the Malaysian authorities more generally if he returns to his home in Malaysia, now or in the reasonably foreseeable future. In *MIAC v SZQRB* [2013] FCAFC 33, the Full Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear' in the Refugee Convention definition. It follows that the Tribunal is not satisfied 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 the applicant will suffer significant harm.
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.

Stuart Webb
Member