

1502598 (Refugee) [2016] AATA 4164 (13 July 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1502598
COUNTRY OF REFERENCE:	Korea, Republic Of
MEMBER:	Tania Flood
DATE:	13 July 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicants Protection visas.

Statement made on 13 July 2016 at 12:13pm

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 the Republic of Korea, applied for the visas [in] April 2014 and the delegate refused to grant the visas [in] February 2015.
3. The applicants appeared before the Tribunal on 24 June 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.

CONSIDERATION OF CLAIMS AND EVIDENCE

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. 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.

9. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa of the same class as that applied for by the applicant. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a spouse.
10. The issue in this case is whether there is a real chance the applicants will suffer serious harm if they return to the Republic of Korea (Korea) or alternatively, whether there are substantial grounds for believing there is a real risk they will suffer significant harm if removed from Australia to Korea. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Summary of claims

11. The applicants confirmed at hearing they are a married couple. The second named applicant claims to be a member of the same family unit as the primary applicant but makes no specific claims of her own.
12. At the Tribunal hearing the primary applicant was asked to read the written claims contained in his application for a Protection visa which were provided in Korean. The following is a summary of the claims provided verbally, and translated at hearing:
13. Due to violence and threats of death from organised crime gangs he had to run away from Korea.
14. His [product] business ran into financial difficulty in 2000 and because he had no security to provide he could not borrow money from a bank. In September 2003 he loaned [amount]AUD at an interest rate of [high]% per annum from an illegal money lender. He thought he would be able to repay the money quickly but his business did not improve and he found it very difficult to make repayments. By 2006 he managed to repay [amount]AUD but thereafter he was unable to continue making payments. Instead he went to [Country 1] to work before coming to Australia to depend on his [relative] who is an Australian citizen.
15. The money lenders are brutal and cruel. He was forced to sign a contract agreeing to sell his organs and was kidnapped and physically assaulted. The money lenders would call him anytime of the day and also came to his house in the middle of night and forced their way in and [made a bad mess of his house].
16. His family members were also threatened with assault. As a result [one family member] left to [Country 2]. [Another family member] is safe for the moment because [has a contact] with a police officer.
17. The aim of the money lenders is to cause him harm and threaten him in the hope that his parents or siblings will pay the debt on his behalf. The money lenders are beyond the reach of the authorities and in any event they do not leave evidence of their wrongdoings so it is not possible to get police protection. Legally they are entitled to collect the debt.
18. If he goes back to Korea the money lenders will find him quickly and his liability including principal and interest has now snowballed up to [amount]AUD. There is nothing he can do

about this and there are newspaper reports about illegal money lenders capturing debtors and harvesting their organs while still alive.

19. At his age it is impossible to find employment in Korea. Even if he is lucky enough to find a job the income won't be enough to sustain him.

Findings and reasons

Country of reference

20. Attached to the Department file are photocopies of the applicants Republic of Korea passports which confirm their claimed identify and nationality. In the absence of any evidence to the contrary the Tribunal accepts the applicants are nationals of the Republic of Korea and has assessed their claims against that country.
21. The applicants do not claim to have citizenship of any other country or the right to enter and reside in any other country. In the absence of any information to the contrary the Tribunal is satisfied that the applicants do not have a right to enter and reside in any other country, and therefore they are not excluded from Australia's protection obligations under s36(3) of the Act.

Member of the same family unit

22. Based on the information before it, including the applicants' oral evidence at hearing, the Tribunal accepts that the second named applicant is the wife of the primary applicant and therefore meets the definition of a member of the same family unit.

Unpaid debts to money lender

23. At the Tribunal hearing the applicant provided a consistent account of the circumstances which led to him taking out a loan with a private money lender. Similarly, he provided a consistent account of the efforts he made to repay the loan up until 2006 and his decision to accept a salary role with a company in [Country 1] in order to absent himself from Korea and the threats he was receiving from the money lender.
24. With respect to the claimed past harm the applicant and his wife separately provided the Tribunal with a consistent account of a physical attack upon the applicant which occurred during a second and final visit by the applicant back to Korea from [Country 1]. Further, the applicant and his wife provided consistent accounts of the threats and harassment from the money lenders prior to this attack including threatening phone calls when they were late making payments, visits to their family home in the middle of the night and threats made against their [family members].
25. Notwithstanding the above, at the hearing, the Tribunal discussed with the applicant, pursuant to the requirement at s.424 (aa) of the Act, certain information contained in the Department file. Firstly, the Tribunal informed the applicant that the Delegates decision dated [in] February 2015 indicates that he arrived in Australia [in] November 2007 but only applied for a Protection visa [in] April 2014 after failing to secure either [of two other visa types] and after a failed request to the Minister for intervention under section 351 of the Act. The Tribunal explained that this information is relevant because it does not appear to support his claim that he fears returning to Korea for the reasons claimed. The applicant replied that he did not inform his migration agent of the problem with the money lender when he first came to Australia because he thought it would show weakness on his part.

26. Secondly, the Tribunal informed the applicant that a community status resolution interview record dated [in] November 2013 indicates he stated he had no debts either in Australia or overseas and that this is relevant because it appears to contradict his claim to have fled Korea due to threats made on his life by a money lender. The applicant conceded that he did not discuss his problems with the money lender with the department officer at first because he was still attempting to obtain a [different] visa. He said it was a mistake not to have mentioned those claims earlier but that later records of interview show that he did introduce the claims in a further interview. The Tribunal confirms that a further record of interview dated [in] April 2014 reveals that the applicant stated he was concerned his safety may be threatened by loan sharks if he returns to Korea. He stated that he did not previously mention the matter because he thought it was a private matter.
27. While the Tribunal has reservations about the late introduction of the applicants claims for protection, in considering his age, former social status as a businessman and cultural considerations, it is prepared to accept that the applicant might have been reluctant to reveal the true nature of his circumstances until such time as he considered he had no choice. Further, based on the information before the Tribunal, and given the nature of the applicant's claims, the Tribunal is also persuaded that the applicant might have been confused about his ability to raise a claim for refugee status. Lastly, the Tribunal has given consideration to the fact the applicants claims are against Korea, a largely functioning and stable state¹, that his [family members] are living in Korea and [Country 2] and whereas he was formerly a business man, based on his oral evidence, he is currently only able to work casual jobs from time to time to make ends meet. The Tribunal considers the circumstances support the applicant has a genuine fear of returning to Korea.
28. For the above reasons, the Tribunal is prepared to accept the applicant is in considerable debt to a private money lender and that he and his family were harassed and threatened and that he was personally physically harmed by the money lender when he was unable to meet his repayment obligations. In view of information² which indicates that illegal money lenders can and do inflict or threaten various degrees of harm on borrowers who are unable to make repayments, or who default on loans, the Tribunal also accepts there is a chance or risk the applicant could face similar circumstances on return to Korea.
29. However, the Tribunal put it to the applicant at hearing that the harm he fears is not for a Convention reason and nor does the independent country information which is before the Tribunal (see below for details) support that he would be denied state protection from the money lenders for a Convention reason. The applicant agreed that the refugee criterion is clear but stated that he is owed complementary protection (see below for further discussion).

Age/Financial hardship

30. It is also submitted that the applicant, at age [age], is too old to gain employment in Korea. The Tribunal explained to the applicant that for economic hardship claims to meet the threshold of serious harm, a person's capacity to subsist would need to be severely threatened and that this doesn't appear to be the case for him. The Tribunal put it to the applicant that based on his oral evidence he has family support in Korea and his wife, who is aged [age], could also work. In this respect the Tribunal notes the applicant's wife holds a Bachelor degree and has previously worked in Korea as [an occupation].

¹ <http://dfat.gov.au/geo/republic-of-korea/Pages/republic-of-korea-south-korea-country-brief.aspx>

² Harlan, C 2012, 'South Korea tries to curb mounting household debt and avert a crisis', The Washington Post, 9 July; 'Loan sharks corner low income earners' 2012, The Korea Times, 22 May; 'Options limited for loan shark victims', 2012, The Korea Herald, 3 May.

31. Further, the Tribunal put it to the applicant that country information indicates that the economy of Korea continues to grow relatively strongly and recorded an unemployment rate of just 3.5% in 2014³. Also the revised Act on Prohibition of Age Discrimination in Employment and Aged Employment Promotion of 2013 requires employers to set the retirement age of workers at 60 or above, which means the applicant is still within the working age range. A comparative study of age discrimination in retirement in South Korea also indicates that people born [in a year range] will become eligible to claim a retirement pension when they turn 61.⁴
32. The applicant responded to this information by stating that it is very hard even for young people to find work in Korea but even if he or his wife were able to obtain work, the small amount of money they could earn would be taken by his creditors. As outlined in more detail below, the Tribunal put it to the applicant that the Korean government is reportedly extending support to victims of unscrupulous and illegal money lenders, such as loans and legal counselling. The applicant stated that no bank would lend him money due to his circumstances. Further, he said that the economy has contracted this year and there are a lot of elderly people living on low pensions. He added that he likes his life here and can live in Australia but he can foresee difficulties in Korea.
33. The Tribunal has considered the applicant's responses at hearing but is not satisfied on the information before it that he will be unable to access an income or be unable to subsist on return to Korea. There is no information before the Tribunal to support that the applicant and/or his wife will be unable to secure paid employment in Korea or that they would be treated any differently to other Koreans in their search for employment. Nor is there information before the Tribunal to support that the applicant will be unable to access a retirement pension in Korea. Further, the applicants have an [family member] living in Seoul whom they could turn to for support and country information indicates that there are support services available in Korea for victims of loan sharks.
34. For completeness the Tribunal notes that the applicant indicated at hearing that they have an apartment in Seoul in the name of his wife which is tenanted under a "key agreement". According to the applicant this rental arrangement entails the renter providing a large upfront payment which the owner can utilise to his or her advantage in exchange for rental. When the rental agreement ceases the owner is required to repay the agreed key money. When questioned further about this, the applicant estimated the property is valued at about [amount]AUD and the key money owed is about the same amount. The applicant stated that he no longer has any of that money left as he used some in his business and the rest for living expenses. He conceded he can always get another tenant to pay a new key amount which he can use to pay the former tenants but there will not be any money left for him to live on as eventually he will be required to hand back that amount as well. Alternatively, the Tribunal suggested he could sell the apartment and use the money from the sale to pay back the current tenants. He reluctantly agreed but again stated that there would be no money left over for them to live on. The Tribunal nevertheless concluded, and the applicant agreed, that the situation in respect of the apartment is able to be resolved so as not to place the applicants in further debt.

Is there a real chance the applicants will suffer serious harm on return to Korea?

³ BTI South Korea Country Report 2016

⁴ [Deleted.]

35. As outlined above, the Tribunal has concluded that any harm the applicant may encounter from the money lender on return to Korea is not for a Convention reason and nor is there evidence to support he would be denied state protection if it is required for a Convention reason. Further, for the reasons outlined above the Tribunal does not accept the applicant will encounter financial hardship on return to Korea on account of his age such that he will be unable to subsist or that he will suffer any other harm amounting to serious harm. Accordingly, the Tribunal finds there is not a real chance the applicants will suffer serious harm on return to Korea for a Convention reason. Therefore, the applicants do not have a well-founded fear of persecution in Korea and do not meet the criteria for protection under s.36(2)(a) of the Act.

Is there a real risk the applicants will suffer significant harm if returned from Australia to Korea?

36. When discussing the fact that the applicant's claims do not fall within the refugee criterion the applicant agreed but claimed he is owed complementary protection. The Tribunal acknowledged this claim but put it to him that under the complementary protection provisions there is not a real risk of significant harm if a person can obtain protection from an authority such that there is not a real risk of him being harmed.
37. When asked if he had reported the threats and harm he experienced at the hands of the money lenders to the police the applicant stated that he did try to report the matter but was told it was a civil matter and therefore not something they could get involved in. Throughout the hearing the applicant insisted that his loan, which was provided on the basis of an IOU which was never provided to him, is between him and another unknown individual taken out through an intermediary organisation called [name]. He said that the money lender did this deliberately to ensure that the matter remains a private affair between two individuals. Further, he insisted that without evidence of any harm there was nothing he could do. At one time during the hearing the applicant intimated that the original source of the loan might be from [another country] but the Tribunal considers this speculative and unsupported by any evidence before it.
38. The Tribunal pointed out that the applicant had previously advised that one of his [family members] [has contact with] with a high ranking police officer and indicated that this ought to have given him some advantage in seeking police protection. The applicant replied that he did discuss it with his [family member's contact] but he also said the police cannot get involved in problems between private individuals. The applicant and his wife both stated that involving their [family member's contact] would only have caused him problems as well.
39. Regarding protection from the authorities, the Tribunal discussed country information reports with the applicant, including several of the following. Based on this information the Tribunal put it to the applicant that it appears he could access protection from an authority in the event he returns to Korea and is threatened or harmed by the money lenders.

Country information

40. Broadly speaking, reports indicate that the Korean state has institutions and capacity to effectively protect its citizens. South Korea performs well internationally in terms of rule of law, security and effective criminal justice.⁵
41. Unlawful debt collection methods are spelled out in the 2002 Moneylending Registration Act, and include that moneylenders shall not assault or threaten borrowers to collect money, nor

⁵ US Department of State 2014, Country Reports on Human Rights Practices for 2013 – Republic of Korea; The World Justice Project 2010, Rule of Law Index 2010

can they 'significantly harm' the private or work life of the borrower by causing fear or uneasiness to either the borrower or to people connected to the borrower. Moneylenders also may not visit the borrower, or those connected to the borrower, without just cause. Those who breach this law may be subject to a maximum prison term of either three or five years or fines of up to KRW 50 million or KRW 30 million, depending on the nature of the offence.⁶

42. Various reports⁷ indicate that the South Korean authorities have taken steps to attempt to protect victims of loan sharks and to increase the level of regulation of the financial sector. For example:
43. The Washington Post reported in February 2014 that the government launched a task force to deal with loan sharks, who sometimes visit borrowers at night and threaten them with assault.⁸
44. In September 2013 the Korea Times reported that financial authorities were moving to crack down on moneylenders who charge unreasonably high interest rates and engage in illegal debt collecting practices.⁹
45. In December 2012 the Korea Times reported that over 10,000 loan sharks were caught in an 8 month intensive crackdown on illegal private lending practices resulting in 290 having criminal charges brought against them. In addition, the government reportedly stated that it had extended support for victims such as long term loans and legal counselling.¹⁰
46. In April 2012 the Korea Herald reported that a call centre established to assist victims of loan sharks received over 5,600 complaints in the three days it opened. Of these complaints, over 5,100 were handed to the Financial Supervisory Service, with the remaining reports passed to police and local officials.¹¹
47. The Herald further reported that under the law on interest limits, unregistered lenders that charge an annual interest of more than 30 per cent are subject to imprisonment of up to a year or fines of up to 10 million won.¹²
48. According to information cited by the Immigration and Refugee Board of Canada in 2011 Korean authorities were attempting to provide assistance to those subject to threats or harm from loan sharks. Measures included a ban on money-lenders seizing and cancelling the insurance policies of debt defaulters in order to recoup funds, and a crackdown on loan sharks.
49. When discussing this information with the applicant at hearing he indicated that there is evidence to support the Korean authorities will not intervene in disputes between private individuals. Further he stated that there is big gap between the law and reality and that in any event he has no evidence to provide the authorities. He also stated that there are reports of about 6,000 to 7,000 people going missing every year in Korea without reason and

⁶ Canada: Immigration and Refugee Board of Canada (IRB) 2007, Nature and extent of loan-sharking; protection available for victims of loan sharks CISNET CX314171

⁷ DIBP, Standard Q&A Report, South Korea: KOR43022 – Loan Sharks – State protection, 10 February 2014

⁸ Harlan, C 2014, 'South Korea tries to curb household debt and avert a crisis, Washington Post, 24 February

⁹ DIBP, Standard Q&A, South Korea: KOR43022 – loan sharks – state protection, 10 February 2014

¹⁰ 'Over 10,000 loan sharks nabbed in 8 months' 2012, The Korea Times,

¹¹ Rahn, K 2013, 'Regulators to probe loan sharks', The Korea Times, 8 September

¹² 'Loan shark crackdown gets massive response', 2012, the Korea Herald, 22 April

many people assume this must be because of private money lenders. Further he stated there is a high rate of suicide amongst people in circumstances like him.

50. The Tribunal invited the applicant to provide any evidence he may have in support of his claims and he indicated he would like to do so. The Tribunal allowed the applicant fourteen days to provide information but at the time of making this decision no such information was received.
51. The Tribunal acknowledged the difficulty and stress for people indebted in such circumstances but pointed out that the available country information indicates the government is implementing measures to protect and provide support to victims of money lenders through long term loans and legal counselling.
52. The applicant insisted that without hard evidence the authorities will not be able to assist him. The Tribunal put it to the applicant that the country information does not support this claim pointing out that the types of unlawful debt collection outlined in the 2002 Moneylending Registration Act include threats and causing fear or uneasiness to borrowers, acts which are unlikely to always be supported by hard evidence. The Tribunal is of the view the country information supports that problems associated with illegal money lending are widespread in Korea and considers the authorities would be well aware of the difficulties victims may have in substantiating their cases. The Tribunal put it to the applicant that it does not appear his situation would be unheard of to the authorities. Further, the Tribunal put it to the applicant that his [family member's contact] is a high ranking police officer and this ought to assist him in getting his matter taken seriously by the authorities. Indeed the Tribunal notes that the applicant stated earlier in the hearing that he believes his [family member] is safe in Korea because of this [contact].
53. Whilst having had regard to the applicant's responses, it is the Tribunal's view that the independent country information referenced above shows the Korean government has, in the years since the applicant departed Korea, been taking increasing measures to crack down on illegal money lenders and to provide support to victims. Together with the fact the applicant's [family member] has a [contact] in the police force, the Tribunal finds that if the applicant is removed from Australia to Korea he will be in a position to obtain protection from an authority such that there is not a real risk of him being significantly harmed if the money lenders continue to threaten or harm him.
54. Regarding the applicant's claim that he will be unable to secure employment in Korea due to his age, as noted above, the Tribunal is not persuaded on the evidence before it that either he or his wife will be unable to find employment. In any event, the Tribunal put it to the applicant at hearing that economic hardship issues do not fall within the definition of significant harm except possibly in certain circumstances of extreme deprivation. As noted above, the applicants have family support they can rely upon in Korea and in addition the primary applicant appears eligible to receive a retirement pension at age 61. The Tribunal considers that any difficulties encountered by the applicants in securing employment in Korea is a risk faced by the population generally and not by them individually. The Tribunal acknowledges the applicant may still be required to service his debt on return to Korea but the country information cited above indicates that there are support services available in Korea for people in these circumstances which include facilitation of long term loans and legal counselling. For these reasons the Tribunal finds there is no real risk of significant harm to the applicants arising from the primary applicant's age and/or economic circumstance on return to Korea.
55. Accordingly, the Tribunal finds there are not substantial grounds for believing there is a real risk the applicants will suffer significant harm if returned to Korea from Australia. Therefore, the applicants do not meet the criteria for protection under s.36(2)(aa) of the Act.

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

DECISION

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