

1514860 (Refugee) [2016] AATA 4160 (19 July 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1514860
COUNTRY OF REFERENCE:	Malaysia
MEMBER:	Nicole Burns
DATE:	19 July 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a protection visa.

Statement made on 19 July 2016 at 5:56pm

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] June 2015 to refuse to grant the applicant a protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Malaysia, applied for the visa [in] June 2015. The delegate refused to grant the visa [in] October 2015.
3. The applicant appeared before the Tribunal on 31 May 2016 to give evidence and present arguments in relation to the issues in her case.

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. The applicant, [an age] year old single woman from Sarawak, Malaysia, set out her initial claims for protection in her visa application, accurately summarised by the delegate in his decision record (a copy of which the applicant provided to the Tribunal on review) as follows:
- She grew up in a poor family in Sarawak. She relocated to Kuala Lumpur and found a boyfriend. Her boyfriend accused her of betraying him. He sent her some nude photographs which he had photo-shopped her face onto. He threatened to send the photographs to her family and social networks unless she paid him a large amount of money.
 - One day she was detained by three men on her way home from work. The men told her they are from the money lending company and they had come to collect her boyfriend's debt. She did not know he was in debt. The men drove her to a quiet street where one of them attempted to rape her. Fortunately some passers-by came to her rescue and took her to the police station to lodge a report.
 - The police investigated the matter. However, three weeks later the debt collectors broke into her house and wrote letters threatening to kill her for not repaying her boyfriend's debt and for lodging a police report.
 - She has been unable to make contact with her boyfriend.
 - She spent all her savings to come to Australia to get away from the debt collectors.
 - She is traumatised by her past experiences with the debt collectors.
 - She fears being killed by the debt collectors if she returns to Malaysia.
 - She does not think the police can fully protect her from this danger.
 - She does not think she can safely relocate within Malaysia because the debt collectors can find her wherever she goes.
11. The applicant also stated she has received threatening phone calls and other letters from the debt collectors to get her to pay back the money her boyfriend owes.
12. The issues in this review in this review are whether the applicant has a well-founded fear of being persecuted for one or more of the five reasons set out in s.5J(1) and if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of her being removed from Australia to her receiving country of Malaysia, there is a real risk that she will suffer significant harm.

13. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
14. The applicant travelled to Australia on a valid Malaysian passport and states that she is a national of Malaysia. The delegate had no concerns about the applicant's identity. Therefore the Tribunal has assessed the applicant's claims against Malaysia as her country of nationality and receiving country.
15. The applicant gave oral evidence to the Tribunal about the reasons she decided to leave Malaysia in March 2015, summarised as follows. She said whilst living and studying in Kuala Lumpur in around May or June 2012 she met a man – [Mr A] - through friends and they started a relationship. Towards the end of 2014, after they had been seeing each other for over two years, the applicant said that one night [Mr A] arrived at her apartment drunk, pushed her suddenly and demanded money. Confused, the applicant asked her boyfriend why he wanted money and told him she did not have any (noting she also had to pay her student loan). He then took out his mobile phone and showed her pictures of her face superimposed on a different (naked) body. He threatened the applicant to show everyone – including her family - those photographs if she did not give him any money. The applicant scolded him and pushed him out of her apartment.
16. Then, a few nights later, the applicant said a debt-collector came to her house and asked about her boyfriend. She tried to contact her boyfriend via the telephone but he did not answer. She then called his friends but they did not know where he was. That night she went to his apartment but he was not there and her neighbours did not know where he was when she asked. Afterwards she went to work and on return to her apartment after work three men approached her in a car, grabbed her and pushed her in the car, and told her she needed to pay her boyfriend's debt. She said they were [specified ethnicity], big, and spoke in Malay. They tried to remove her clothes however a couple who were nearby heard her screams and the men pushed her out of the car and then drove away. She said the car had stopped near [a named venue], in a back alley at a leisure mall.
17. The applicant said the couple took her to a police station in [that venue], where she told the police about what had happened and lodged a report. The police said they would investigate the matter but they did nothing.
18. The applicant said a few weeks later when she was away from her apartment buying groceries, someone broke into her apartment, took her television, video player, laptop, two phones and wrote on a piece of paper that she needed to pay the debt or would be killed, because she had reported the matter to the police. The applicant returned to the same police station and reported the break in and threats. The police visited her apartment and again promised to look into the matter. She told them repeatedly that it was her boyfriend who owed the men money, not her. After that the applicant said she felt like there were men following her wherever she went. Sometimes they would try to push her and look at her and sometimes when they walked beside her she heard them whispering. She then stopped walking alone.
19. The applicant said her ex-boyfriend owed [amount] ringgit¹ to these men. She said she does not know why he gave them her name and apartment details, but speculated that he may have used her name and signature before disappearing.
20. The applicant said she received threatening letters ever two weeks for around three months after the debt collectors had broken into her apartment, pushing her to pay the loan. She

¹ AUD[amount] as at 19 July 2016, www.oanda.com/currency/converter/

said she never paid them any money. She gave the letters to the police but did not get them back, or anything in writing from the police about her case.

21. The Tribunal has a number of concerns about the applicant's claims to fear money lenders from a loan her ex-boyfriend allegedly incurred and claims of past harm and threats that resulted, as follows.
 - a. Some inconsistencies exist between the applicant's written claims in her visa application and oral evidence to the Tribunal in some key respects. For instance, in her written claims to the Department the applicant stated that when at home she received a letter from her boyfriend containing nude photographs of herself, threatening to spread the picture (to her family and social network) if she did not give him a large amount of money. However at hearing the applicant told the Tribunal that her boyfriend came to her house (drunk), showed a nude photograph of her face and a different body on his phone and threatened he would show everyone if she did not give him money: he did so in person, not via a letter.
 - b. The fact that the applicant remained living in her apartment for a number of months – from late 2014 until her departure in March 2015 – after an alleged attempted rape, break in and having received a number of threatening phone calls and letters causes the Tribunal to doubt her claims in this regard. At hearing the applicant said she stayed in her apartment because she had financial problems and the rent was low. She did not tell her parents in Sarawak, because she did not want to be troublesome. Nor did she tell any of her friends in Kuala Lumpur because she was worried they would try and help which would place them in danger. However if the applicant genuinely feared serious harm, possibly murder as she has claimed, the Tribunal would have expected her to have moved out of her apartment at least temporarily, even if she was embarrassed about the matter and did not want to involve her friends and family, and the rent was low, as claimed.
 - c. The Tribunal finds it odd that whilst on the one hand the applicant claimed these debt-collectors had threatened her with murder and attempted to rape her in late 2014, they did not actually harm her or follow through with their threats, even though the applicant remained living at her apartment in Kuala Lumpur until she left the country in March 2015.
 - d. The Tribunal also finds it somewhat implausible that the applicant had a relationship with [Mr A] for a number of years, which in her oral evidence was a reasonably good relationship (in her protection visa application she stated that "our life is very happy") when all of a sudden he appears at her apartment and threatens to distribute (fake) nude photographs of her if she does not give him money. The Tribunal also is of the view that he would have known that she did not have much money given she was studying and had to pay off a student loan, and they had been together for a number of years.
 - e. The applicant's claims are also internally inconsistent in some respects. For instance on the one hand she claimed that her ex-boyfriend threatened to distribute her (nude) photograph to friends and family if she did not give him money and at hearing she said she did not give him any money and did not indicate that he distributed the photographs. However in her protection visa application she stated, in response to the question about whether she experienced harm in Malaysia, that her boyfriend was spreading fake nude pictures to his friends and they accused her of being a "bad woman".

22. Given these concerns the Tribunal is of the view that the applicant exaggerated aspects of her claims. It accepts that she was in a relationship with [Mr A] from around 2012 until the end of 2014, noting her consistent evidence in this regard. However the Tribunal does not accept that [Mr A] borrowed money from money lenders; that he threatened the applicant in a bid for her to give him money; that money-lenders threatened her, attempted to rape her, or broke in to her apartment thereafter in a bid to recuperate monies owed them by her ex-boyfriend; or that people were following her in the months leading up to her departure from Malaysia.
23. The Tribunal finds the applicant does not face a real chance of serious harm from money lenders on return to Malaysia now or in the reasonably foreseeable future. Her fears of persecution on this basis are not well founded.
24. Based on the above the Tribunal does not accept that the applicant's former boyfriend borrowed money from money lenders nor that the applicant was ever threatened or harmed by these money lenders in Malaysia in the past and therefore it does not accept that if she returns to Malaysia she faces a real chance of persecution from money lenders or anyone else. The Tribunal finds that the applicant does not face a well-founded fear of persecution as per s.5J(1) of the Act and therefore the applicant is not a refugee within the meaning of s.5H(1). The applicant does not meet the refugee criterion in s.36(2)(a).
25. Nor does the Tribunal accept that there are grounds for believing that as a necessary and foreseeable consequence of being returned to Malaysia, there is a real risk that the applicant will suffer significant harm from money lenders or anyone else for any reason. The Tribunal is therefore not satisfied that the applicant meets the alternative provisions in s.36(2)(aa).
26. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

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

Nicole Burns
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.
- ...