

1213561 [2013] RRTA 26 (25 January 2013)

DECISION RECORD

RRT CASE NUMBER: 1213561

DIAC REFERENCE(S): CLF2012/79759

COUNTRY OF REFERENCE: Malaysia

TRIBUNAL MEMBER: Chris Keher

DATE: 25 January 2013

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

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 (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of Malaysia, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] June 2012.
3. The delegate refused to grant the visa [in] August 2012, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of 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 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person in respect of whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

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 Refugees 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. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

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)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: 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 fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. 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.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. The applicant appeared before the Tribunal on 24 January 2013 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
21. In his original application the applicant claimed as follows: The applicant is [name deleted: s.431(2)]. He was born in Sibuluan, Sarawak, Malaysia on [date & age deleted: s.431(2)] years of age. He is ethnic Chinese and a citizen of Malaysia. He is Christian. He married [in] 2011 in Sibuluan City. He has a son born [date deleted: s.431(2)]. He was educated for 13 years from [date deleted: s.431(2)] until the age of [age deleted: s.431(2)] years. He worked from [2010] to [2012] as a salesman for [company name deleted: s.431(2)] in Sibuluan City earning RM 1000 per month. His father was born in [year deleted: s.431(2)] in Malaysia and is a Malaysian citizen. His mother was born in [year deleted: s.431(2)] in Malaysia and is also a Malaysian citizen. He lists [siblings].
22. He provided a statement with his application. It is written on the back of a document headed "[CONTRACTORS] RECORD SHEET" It is written in Chinese and is translated into English. Relevantly it claims that the applicant came to Australia as a tourist intending to stay 6 days and on the fourth day he was contacted by his father and "my family asked me to stay in Australia temporarily because of severe problems of security arose due to Malaysian general election. Some government officers threat my father publically. More extremely, the officers of UMNO (Malays organisation) demanded in public that Malaysian Chinese should vote for Barisan

national, otherwise Malaysian Chinese would be expelled from Malaysia”. He claims it was for this reason his father asked him not to “return for the moment”. He claimed Malaysian Chinese had no security; they are often beaten in public and the “police overlooked it”. Police detain Malaysian Chinese who are involved in “political dispute” and his father “often argued with UNMO officers, so he worried about my personal safety and asked me to evade in Australia for the moment”.

23. At hearing before the Tribunal the applicant was asked to explain why he feared harm on return to Malaysia and to give specifics of his claims. He said it was because “Chinese people are discriminated against in Malaysia ...unfair treatment ... Malaysian government says all races are equal but in reality it is different ... for political reasons we are persecuted”. He was asked for specifics and said “at marches and if there are government protests the police will be called and the police will use smoke bombs on the people”. He was again asked for specifics and in particular how he claimed he was affected. He said “I participated in political activity” He was asked for specifics and said “some anti-government activity and the government is unfair” I put to the applicant that what he was saying was general in nature and I required that he give me specifics of how he claims to have been harmed in Malaysia. He said “the current situation in Malaysia is very unfair for Chinese people and they do not have an opportunity to vote”. I put to him this was not true. He claimed “I am [age deleted: s.431(2)] years old and cannot vote” I put to him I did not accept this to be true. He then claimed that though Chinese people have the right to vote “for political reasons Chinese people’s votes will be considered invalid as they abstain” I put to him that if they abstain this is not the same as not being able to vote and was their choice. He then claimed “some government officials will not count you vote if you are Chinese” I again asked the applicant to detail specifically for me how he was ever harmed or discriminated against in Malaysia. He responded by saying that his father was involved in politics many years ago and was arrested, and when released he lost his Malaysian citizenship. This was 20 to 30 years ago and he had never been able to regain it. I put to him I did not believe this and referred him to his original application wherein he said his father was a Malaysian citizen. He claimed that as a result “the kids are not able to get scholarships to attend school”.
24. He confirmed that he attended 12 years of school and worked for 2 years as a salesman “but the pay was low as it is more difficult for a Chinese to find a job ... many jobs require better education and family background” He said his father has not worked for many years and used to be a businessman, but ceased this when he was detained many years ago. He claimed his older brother has told him of this history. He confirmed that he is married and his wife and child reside with the wife’s parents in Sibiu. I asked why he has left his wife and child in Malaysia if he considers it so dangerous. He said she could not leave as their child is very small.
25. I asked the applicant why he came to Australia. He said this was because “people in Australia are fairly treated” He said that he had been living in [Town 1] soon after arrival as he heard that it was cheaper to live there than other parts of Australia. He has been in [Town 1] since about 2 weeks after arrival. He claimed not to work and to have filled his time by “not much I have applied for refugee status and I previously lived with a friend”. He claims that he now lives alone as his friend has returned to China. I asked again what he did in [Town 1] and why so many Malaysian people who were applying for protection visas seem to be living there. He again said this was because it was said that the “cost of living is cheaper” I put to him that I did not believe him and considered he was living there as he was working in [Town 1]. He denied this and said with his visa he is not allowed to, and he did not bring much money to Australia and the cost of living is cheaper in [Town 1].

26. I asked the applicant who [the] Contractors were. He at first said he didn't know, and then said "I don't really know maybe one of the bosses there said we don't employ people who are on a refugee application". I put to him that his application statement is written on the back of a document headed "[CONTRACTORS] RECORD SHEET" He then claimed that his Chinese friend who had been living with him had been a foreman with that company and must have left this scrap paper around the house. I put to the applicant that I believed he was working there as well. He denied this and said he had asked about working there but had been told he couldn't as they wouldn't employ him as he is applying for a refugee visa and as such is not allowed to work.
27. I put to the applicant that I was aware of policies of the Malaysian government in the form of positive discrimination towards the Bumiputra (ethnic Malays) and that such positive discrimination did not equate to discrimination against others but was a government policy used to address prior inequity. I put to him that he had been educated for 12 or 13 years, had worked for 2 years, was married and been issued a passport by the Malaysian government. I put to him in such circumstance and from what he had said so far I could not see that he had suffered any harm in Malaysia such as could be considered as persecution. He said "in Malaysia we cannot live the life we want".
28. I put to the applicant that what he had said at hearing bore little resemblance to his original claims. He said "I know in my application I wrote about political issue and how UMNO persecuted my father and government officials said we Chinese and Indians must vote for the government party or must return to our own country ... Malaysia is about to hold a general election ... on 22 February Parliament will be dissolved ... and officials have been to universities and said that we must vote for the government party and not the opposition".
29. I asked the applicant to provide detail about his siblings and parents. He claimed that he has [details of siblings deleted: s.431(2)]. His parents rent their home. He claims his father couldn't buy a house as he isn't a citizen. His mother is a citizen though is now too old (at [age deleted: s.431(2)]) for a bank to lend her the money. His wife lives with her parents and now does not work. She used to work as a [profession and workplace deleted: s.431(2)]. He claims his father is restricted to live in the eastern part of Malaysia and cannot travel to the western part.
30. The applicant requested additional time in which to obtain documents to verify aspects of his claims. I advised him that the request was not granted as I considered that his claims were not honest, that he had come to Australia to work and I didn't believe his claims that he was not working. I considered his request only one to allow him more time to work in Australia. I put to him that what he had detailed at hearing of his and his family's history did not demonstrate any level of harm as could be considered as persecution. He had no further comment.

FINDINGS AND REASONS

31. I have taken account of the Tribunal's guidelines 'Guidelines on the assessment of Credibility' Credibility is difficult to assess and in my view should not be made on demeanour or reaction at interview. However, where there are clear inconsistencies or where some claimed history is far-fetched or unrealistic it may be that those claims, after careful consideration, cannot be accepted as being true.

32. I accept as true that the applicant is a citizen of Malaysia. He has provided a copy of his passport and the original was sighted by me at hearing. I accept he does not have a presently existing right to enter and reside in another country as meant by section 36(3), I also accept that he does not have rights and obligations attached to the possession of nationality in any other country as meant by Article 1E of the Convention.
33. The applicant is relatively well educated and has attended school in Malaysia for 12 or 13 years. I am satisfied he has been able to fully explain his concerns. Aspects of his history and claims give rise to a serious concern as to the veracity of his claims and his credibility. In particular:
- As discussed with the applicant at hearing I have a concern as to why he came to Australia and why he has stayed and applied for a protection visa. As discussed with him part of the concern is why he has written his statement on the back of a document headed [CONTRACTORS] RECORD SHEET. He at first denied knowing what I was talking about when I asked him who this firm was. He then claimed that this may have been the firm he had sought work with and been told that he couldn't be employed, and then when shown the document that it was his former flatmate who had worked for the company as a foreman prior to return to China, and it must have been the flatmate who had left scrap paper around the house and he has used it to write his statement. I have considered this in the context of his being in [Town 1] within a short time of his arrival in Australia, his claims that the only reason he is there as it is cheaper to live there than elsewhere, and his claim of not working. I do not believe him and consider he is not being truthful. I consider that his arrangement to travel to and work in [Town 1] was the reason he came to Australia, and the reason he has stayed and applied for a protection visa.
 - The applicant claims that ethnic Chinese are discriminated against in Malaysia. Despite being asked to detail how this has affected him he has not been able to other than to make general claims. He has not provided any detail of any specific harm. He has been educated for 12 or 13 years and has been able to work in Malaysia for 2 years until shortly prior to his departure from Australia. This history does not demonstrate that he has been affected at all by any claimed discrimination.
 - As is apparent from the claims detailed by the applicant relating to his family, and in particular his siblings, it is apparent that, though he claims ethnic Chinese are discriminated against, his siblings have objectively experienced a privileged education background and some are engaged in professional careers. All who have completed high school have attended university and are working or continuing at university for higher qualifications. This history does not demonstrate that he has been affected at all by any claimed discrimination.
 - He claims his father has lost his Malaysian citizenship through some form of political activity 20 or 30 years ago, as a result closed his business and is unable to travel to some parts of Malaysia. I do not accept this is true and note that in his original application he said that his father held Malaysian citizenship. I consider that original statement to be true and that the applicant is now wishing to change that position so as to enhance his claims.
 - The applicant at hearing claimed that ethnic Chinese in Malaysia cannot vote. I put to him this was not true. He then changed his claim to be that ethnic Chinese abstain from voting. I put to him that this did not demonstrate that they could not vote. He then changed his claim to be one whereby officials in some way do not count the vote of ethnic Chinese. I

do not accept that as true and consider it fanciful. His changing his claim from one point to another demonstrates that he is manufacturing his claim and is prepared to not be truthful.

34. Overall I find that he is not a credible witness and that he has fabricated his claims for the purpose of enhancing his protection visa application.
35. A consideration of whether a person falls within the Convention definition of a refugee requires a reasoned consideration of the evidence and a reasoned appraisal of the reasonably foreseeable future.
36. I am prepared to accept that there is positive discrimination in Malaysia for ethnic Malays. Such positive discrimination does not equate with discrimination against other races. That level of positive discrimination is in place to try and develop the ethnic Malays prior disadvantaged position. On an objective level the applicant and his family have not suffered harm as could be considered as persecution as meant by the Convention and section 91R of the Act.
37. I also accept that the Malaysian general elections are likely to be held in the next few months. The applicant has presented no evidence that this will result in any harm to him or anyone else.
38. Overall I find that the applicant is not a credible witness. I find that he does not have a well-founded fear of harm for reasons of a Convention ground.
39. 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). For the same reasons as detailed in paragraphs 33 to 38 above I am not satisfied there are substantial grounds for believing that if returned to Malaysia there is a real risk that he will suffer significant harm.

CONCLUSIONS

40. 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 satisfies does not satisfy the criterion set out in s.36(2)(a).
41. 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).
42. 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) for a protection visa.

DECISION

43. The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.