

1510961 (Refugee) [2015] AATA 3570 (2 November 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1510961
COUNTRY OF REFERENCE:	Malaysia
MEMBER:	George Haddad
DATE:	2 November 2015
DECISION:	The Tribunal affirms the decision not to grant the applicant a protection visa.

Statement made on 02 November 2015 at 4:33pm

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

1. The applicant claims to be a citizen of Malaysia. In his application for a protection visa he stated that he had left Malaysia because of fear of police corruption. A delegate refused to grant the visa [in] May 2015. A summary of the relevant law is set out at Attachment A. I have taken the policy guidelines prepared by the Department of Immigration and the country information assessments prepared by the Department of Foreign Affairs and Trade into account to the extent that they are relevant. The issues 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 the Refugees Convention in Malaysia and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Malaysia, there is a real risk that he will suffer significant harm.

CONSIDERATION OF CLAIMS AND EVIDENCE

Does the applicant have a well-founded fear of being persecuted for one or more of the five reasons set out in the Refugees Convention in Malaysia?

2. The applicant is a [age] year old Malaysian national. He first entered Australia [in] March 2014 on a three months Electronic Travel Authority and a valid Malaysian passport.
3. I am satisfied on the basis of a copy of the personal page of his Malaysian passport that he is a citizen of Malaysia. I accept that Malaysia is the country of reference for the purposes of the *1951 Convention Relating to the Status of Refugees*, as amended by the *1967 Protocol Relating to the Status of Refugees* ('the Refugees Convention'), and that it would be the applicant's receiving country for complementary protection consideration.
4. I am also satisfied that, for the purposes of s.36(3) of the Act, the applicant does not have a right to enter and reside in a third country. I have assessed the applicant for claims against Malaysia.
5. The applicant set out his claims in a statement attached to his protection visa application.
[The applicant]'s written statement of claims
6. The applicant claims that he worked as [occupation] in a [centre] in Pahang, Malaysia from 1996 until recent years. He claims that he acted as middleman between the boss of the [centre] and the police and local government enforcement officials. He paid them money each month in return for not taking action against the centre having around [number] illegal [items] at the back of the shop as those [items] were the most profitable for the centre. In addition to paying money, he entertained police and local government officers and paid for their travel and hotel accommodation. He also travelled to the capital of Pahang to give money to other officers.
7. At the state level of the Royal Malaysia Police, he worked as middleman from 1996 until 2013, some officers became his friends and he did not have any bad experiences or concerns.
8. He left his job as [occupation] of the [centre] to start a [business]. He also began to develop interest in issues such as political corruption and racism. In recent years he began to join peaceful demonstrations and he had discussions with friends and at old classmates' gatherings about corruption in politics. He began to receive calls from officers he knew and to whom he had in given money in the past when he worked [at] the [centre]. They asked

him to 'keep his mouth shut'. Some of these officers have risen in rank and they fear that the applicant could expose them for taking money.

9. At last year's Chinese New Year he was in a gathering and discussed the weaknesses and unfairness of the government's policies and management. Following that he began to experience unusual events, strange cars would pass his house travelling slowly late at night.
10. He had a feeling that they may be seeking to intimidate or scare him and worried about his safety and his life, as he was aware of deaths in custody.
11. He was also aware that the general elections were set to be held in April 2014 and the worst could happen. So he took a flight out of Malaysia to Australia [in] March 2014.
12. He stated that the general elections were held on 5 May 2014 and the government was returned to office with 133 seats of 222 seats (the general elections were held in May 2013).
13. He thinks that democracy and freedom in Malaysia is getting worse and if he were to return to Malaysia he may be detained without trial and would be hurt while in custody and his life would not be safe.
14. At the hearing held on 16 October 2015, the applicant stated that he was born in Pahang and after completing school education in [year] he moved to Kuala Lumpur and worked for 3 years before returning home to help his father [in] the family [business].
15. He has a school friend who came from a wealthy family. His friend and his friend's brother are well connected with the police and they ran a [centre] in a very small [village] located around 5 hours from the applicant's hometown. The [centre] also had some "[items]" which the applicant described as [deleted].
16. In 1996 the applicant he took the job of 'middleman' at the [centre]. His job was primarily to pay money (bribes) to the police and local council inspectors and officers. He remained in this role until 2010 at which time the owners employed someone else to replace him as he wished to return to the family [business] but he remained on a part time basis a few days each month until 2013. He remained because he the owners needed him as he had built good connections with the police and the city council. His connections with the police ranged from the constable through inspector up to superintendent.
17. Some of the police officers became good friends. One, originally from [another country], became a very good friend who would trust the applicant with personal matters was promoted to assistance commissioner position.
18. The applicant described how the local law did not permit individuals to operate such business as the [centre], so he arranged for the local [sporting] club to obtain the licence to operate the [centre] in return for some 'rent'.
19. The applicant said that he arrived in Australia on a 3-month visitor visa in March 2013. I indicated that this may be incorrect and that it may have been March 2014. The applicant said that it was March 2014 and he had simply made a mistake.
20. I asked him what his intentions were when he came on a visitor visa. The applicant said that there were some tensions. Many of the police officers he knew have been promoted to high ranks including head of department at state level and one has become [a senior officer]. The applicant had had some conversations with friends about racism and politics. About 2 years ago he received calls on his phone with "no caller ID" and the caller told him "don't talk too

much politics and opposition parties". The applicant said that he is not a member of a political party but he just could not stand racism and the situation.

21. The applicant said 'I think they were scared because I kept secrets about very people in very senior positions, if the opposition party wins the election I might expose their corruption'. He said some of these officers were very good friends but some were 'Islamic thinking and they were scared I might expose them'. I asked if he had planned to expose them. He said no, he did not. The applicant commented that it is common for businesses to give money to police
22. I asked the applicant what he thinks he did that might have prompted suspicion that he would expose them. He said the calls did not have caller ID and maybe these people received messages about the applicant attending protests.
23. I asked if he had attended any protests. He said he attended two 'bersih' protests and public speeches given by opposition politicians. He said that on one occasion he was in a crowd of more than 10,000 and other times in crowds of few hundred. He added that he is not a 'big man' and it's very normal to attend these events in Malaysia and repeated that he is a 'very small man'. He said he could not have been seen or singled out in the crowds. But he received the calls telling him not to become involved in politics. He said he received 'too many threatening phone calls telling him not to get involved in politics'. I asked if he replied to the caller, he said he told the caller that he is not a member of a political party. But he thinks they don't like seeing his face out there'.
24. I asked the applicant if he had spoken openly with anyone about giving police money. He replied "actually corruption is widespread" in Malaysia but he did not answer whether or not he had spoken openly with anyone about giving money to the police.
25. He also said "*I'm feeling strange cars passing my house*". He knows how police treat people in the lock up. I asked if was taken in and placed in a lock up. He said he was not.
26. I asked whether he called his friends in the police such as the very good friend who has been promoted to [a senior officer role], he said he did not. He said that his friend was moved to another location with the promotion. I noted that the Royal Malaysian Police is not confined to states and I could not see why he would not call any of his good friends in the police especially this trusted friend now [a senior officer].
27. I asked why he thought he could get the police officers into trouble only because he gave them money. What effect would it have if he "a small man" were to assert or allege that he bribed the police, given he stated, and the country information confirms, that police corruption is widespread. The applicant replied that he "*is not politically active, but he has been involved for many years in giving money to police*".
28. I asked why the police would have concerns about his involvement in giving bribes given he said that it is common for business people to bribe police in Malaysia. He said when other businesses do it, they do not do it often but he has been doing it for a long time and because he was dealing in illegal activity but other businesses conduct normal business activity. I asked if he is suggesting that only he was involved in illegal business activity; he said no, many others do, however they are not involved politically. I reminded him that he had said more than once during the hearing that he was not politically involved. He said originally he was not but he was starting to become involved and they were concerned or critical of his involvement. He added that he met with a group of friends who were not involved in illegal business activities and "*maybe I catch their eye or a person from Special Branch; Special branch used to focus on terrorism but recently they focus on opposition politics and social activity*".

29. I asked the applicant about his activities in Australia.
30. He said that he arrived in [a city in] Australia where he has a cousin. But he did not tell his cousin that he was fleeing Malaysia. He travelled to “[an island] of Australia” where he remained for two and half months; he worked at a [workplace] in return for food and a bed. He returned to [the city] before his 3-month visitor visa expired and stayed with his cousin. He was still scared to go back to Malaysia. He left [the city] and travelled to [a town in regional Australia]. He stayed one month with a friend he had met on [the Australian island]. He became bored because he could not find work. His friend gave him two contacts in [City 1] and in August 2014 he travelled to [City 1]. Two or three months later, some friends told him about protection visas and he applied for a protection visa. He said he did not know about protection visas. I indicated that it does not seem credible that he would have the political interests that he claims to have; and protection and refugee issues have been the subject of news for several years including the involvement of Malaysia; he claims to have fled Malaysia for fear for his life and would not know about protection visas. The applicant repeated that he fears returning to Malaysia because ‘ they could come for him again, he may be arrested, the authorities are using the Sedition Act and they can arrest anyone without reason. Many would want to seal his lips. The higher they reach the more they worry about their past. They know that he knows about their past. For many years he has been the middle man in the same location. They have a close eye on him. He has received odd calls and seen cars going past his house. One of the top officials who had taken money from the applicant told him to “*slow down*”. Those who called him were well-meaning people seeking to warn him and if he had not heeded the warning it might have been too late. He has no physical evidence to show and he has not suffered any actual harm.
31. I considered the applicant's evidence and discussed country information relating to the police and judicial system in Malaysia. I indicated that I found his evidence relating to fear of the police harming him because of having bribed them over several years to lack credibility and I may not accept his account of receiving the calls he claims to have received. I had difficulty accepting that on the basis of the claimed phone calls and some cars passing by his house, he would flee the country without any attempt to call his good friends in the police to make some basic enquiries. On his own evidence if the police officers had in fact concerns they might have arrested him and ‘locked him up’; and I indicated that in his circumstances, I may take a negative inference from the delay of around one year in applying for a protection visa.
32. The applicant submitted photocopies of four photographs. In one he appears on a street holding the Malaysian national flag. He said it was taken in Malaysia. I asked him of the significance and whether it related to an event. He said it did not. The remaining three were taken in [City 1], one has [a church] in the background and several people on the street; a close up of the applicant is in the foreground; two show the applicant in a crowd holding up a poster with the message “[message deleted]”. He said that the photos were taken at [a] Bersih demonstration in [City 1] which was coordinated with similar demonstrations in Malaysia and other cities around the world.
33. On the basis of the applicant written statement and his oral evidence his claims may be summarised as being based in fear of returning to Malaysia because of his race, he said on a couple of occasions that he had discussed racism which was part of his interest in attending ‘bersih’ demonstrations and public speeches by opposition politicians; his central claim relates to having worked in a [centre] with illegal [items] and acted as middleman with the police and government inspectors bribing and entertaining them over several years. He claims that the police are concerned that he will expose their corruption

Middleman involved in bribing and entertaining police and government inspectors

34. I accept that the applicant worked in a [centre] which had illegal [items] and required him to bribe and entertain police and other officials. I have considered his evidence and I put to him during the hearing that his account sounded implausible. I noted how his evidence evolved as I put questions to him. In his written statement he wrote that it was officers he knew that called him. In his oral evidence he maintained for a considerable time that it was anonymous callers "No Caller ID" and they were people with good intentions seeking to warn him.

35. A 2013 KPMG corruption survey, which polled executives from 100 listed companies, found that:

71% of respondents believed that bribery and corruption is an inevitable cost of doing business whilst 64% believed that business can't be done in Malaysia without paying bribes.¹

36. Based on findings from a survey by the Malaysian chapter of Transparency International, the Malaysia Insider wrote in May 2014:

Of the 2,000 respondents surveyed, 45% of Malaysians perceive political parties to be the most corrupt, followed by the police (42%), public officials and civil servants (31%) and parliament and legislature (23%).

[...]

The MCB [Malaysian Corruption Barometer] findings also showed that 45% of the respondents had been asked to pay bribes in the past. The highest incidence of bribery in the past 12 months is recorded for the police followed by registry and permit, with the most common excuse given being to "speed things up".

The Inspector General of Police announced the establishment of an Integrity and Standard Compliance Department (ISCD) in July 2014 to enhance police integrity and image. The National Human Rights Commission (Suhakam) also receives complaints against the RMP and has conducted investigations into police behaviour. However, the Government is not required to formally consider Suhakam's reports or recommendations.

The willingness of the public to report incidents of corruption declined from last year's GCB results (79%) to 51% this year. Most respondents who said they would not report these incidents admitted they are afraid that there would be negative consequences.²

Police corruption/ the applicant's claim of threatening phone calls

37. I accept that there exists widespread corruption in the Royal Malaysian Police, the DFAT Report provides:

Police Integrity and Accountability

5.5 The Royal Commission to Enhance the Operation and Management of the Royal Malaysia Police in 2005 identified a perception of widespread corruption within the RMP. In response, the Government publicly acknowledged corruption within the RMP

¹ KPMG International Cooperative 2013, KPMG Malaysia fraud, bribery and corruption survey 2013, 10 December, p.42

<<http://www.kpmg.com/au/en/issuesandinsights/articlespublications/pages/corporate-responsibility-reporting-survey-2013.aspx>

² 'Political parties perceived to be most corrupt, says survey' 2014, *Malaysian Insider*, 14 May <http://www.themalaysianinsider.com/malaysia/article/political-parties-perceived-to-be-most-corrupt-says-survey>

and implemented reforms, including establishing compliance units within the RMP. Police officers were subject to trial by criminal and civil courts and disciplinary action was taken against officers, including suspension, dismissal or demotion.

...

38. The country information above, clearly indicates the extent of bribery to police and other officials. I have considered the applicant's evidence and do not accept that the police would have any concerns or fear of the applicant 'exposing' the bribery in which he claims to have engaged in a 'very small [village]'. In addition to the country information, I have also taken into account inconsistencies in the applicant's evidence. In his written statement he claimed that he received calls from the police officers to whom he had been giving money. In his oral evidence he said repeatedly that he received calls with 'no caller ID' except later in the hearing when I was questioning the credibility of his account, he added that a high ranking officer that he knew had also called him and said 'slow down'.
39. The applicant claims that the police officers to whom he gave money and provided other inducements over several years, fear that he holds secrets about them and that he might expose them for having taken bribes. Having considered his evidence I do not accept that the applicant received any threatening phone calls from police officers he had previously bribed or anonymous callers. I am satisfied that the applicant has made up this evidence in order to base a claim for a protection visa after a considerable time in Australia. Further, given the above reports of the widespread corruption, I do not accept that the police had or would have any concerns about the applicant – in his own words 'a small man' working at a [centre] in a 'very small [village]' having knowledge of bribing them, whether or not he were to declare publicly that he did, although I note that the applicant consistently said he did not have and does not have any intentions of declaring that he has bribed police or other officials. I do not accept that cars drove slowly past his house with any intention to threaten to harm or frighten the applicant. Accordingly I do not accept that the applicant faces a real chance of serious harm as a result of his previous activity as a middleman bribing police and other officials for any of the Convention reason now or in the reasonably foreseeable future if he were to return to Malaysia.

Actual of imputed political opinion

40. I found the applicant's evidence relating to political involvement to be at times confused, inconsistent and overall to be at best very low level involvement. He repeatedly stated that he was *not* politically involved; he attended public speeches delivered by opposition politicians among several thousands of people or a few hundred people. He said that he could not have been singled out in a crowd. He also said that the Special Branch may have had an eye on him. I formed the impression that he was either being highly speculative or simply making up the evidence.
41. I accept that the applicant attended 'bersih' demonstrations in Malaysia. I accept that he attended a public event, among a crowd of 10,000 or more, and listened to speeches by opposition politicians in Malaysia. I accept, based on the photographs he submitted, that he appears to have attended [a Bersih] demonstration in [City 1] in [2015] which was coordinated with similar events in a number of cities around the world including Malaysia. I accept that he did not attend the demonstration in [City 1] for the purpose of strengthening his claims as a refugee.
42. The applicant described Bersih as a non-government organisation which all Malaysians from all ethnic groups and walks of life supported and participated in the demonstrations organised. There have been 3 previous Bersih events, hence the '[term deleted]' identifying the coordinated rally in [2015] and which the applicant attended in [City 1]. He also said that

the Malaysian government claims that Bersih's is trying to bring down the government. He said that the organisation is not involved in political activity. It includes all peoples of Malaysia, politicians, Malay, Indian Chinese and its objective is to have 'green and clean elections'. He said "I want a clean government without corruption". I observed that for several years he had knowingly engaged in and made his living from illegal business and corruption. I asked what had changed that prompted him to eradicate corruption. He said 'our country is democracy bought with money. In 2010 I began to slowly detach from illegal activities.'

43. There are many reports and references relating to the *Bersih* movement. *The Straits Times* 27 August 2015 provides³:

What is Bersih?

Bersih, which means "clean" in Malay, refers to the Coalition of Free and Fair Elections. It is a civil society movement consisting of 84 non-government organisations calling for a thorough reform of the electoral process in Malaysia. It is led by Maria Chin Abdullah from the Women's Development Collective (WDC). Its previous chief was former Bar Council president Datuk S. Ambiga.

Bersih was first launched in November 2006 as a political party-driven movement with members consisting of opposition political leaders and representatives from the civil society. In April 2010, the movement was re-named Bersih 2.0 as a fully non-partisan movement free from political influences.

What is Bersih 4.0?

Bersih 4.0 is the fourth rally planned for three cities on Aug 29-30 to push for Prime Minister Najib Razak's resignation as well as institutional reforms to prevent prime ministerial corruption. The rally comes amid allegations in the Wall Street Journal that US\$700 million (S\$981 million) in state funds was deposited into Mr Najib's personal bank accounts and alleged mismanagement of debt-ridden state investor 1Malaysia Development Berhad (1MDB).

Bersih says recent events in Malaysia, including the removal of Abdul Gani Patail as Attorney-General and the removal of ministers who had spoken out on the 1MDB issue, have triggered the call for the rally.

Organisers say protests will be held in Kuala Lumpur, Kuching and Kota Kinabalu from 2pm on Aug 29 until midnight Aug 30.

The Malaysian police have declared that Bersih 4.0 is illegal due to the organisers' failure to furnish permissions from premises owners to use their locations as rallying points. Police say those who join the rally can face legal action under the Peaceful Assembly Act.

Inspector-General of Police Khalid Abu Bakar has also warned all quarters not to incite violence. He was responding to news reports that an anti-Bersih group would be training with machetes and swords as preparation to counter the Bersih rally.

But the group leader, Umno division chief Jamal MD Yunus, has said the training is for self-defence and not to incite violence. He plans to mobilise 30,000 people to counter the Bersih rally.

Bersih chief Maria Chin Abdullah has insisted the rally will take place as planned and the group will work with the police to ensure that the event is peaceful.

³ <http://www.straitstimes.com/asia/se-asia/what-you-need-to-know-about-malysias-bersih-movement> (accessed 23 October 2015)

SOURCE: ASTRO AWANI, CNN, MALAYSIAN INSIDER, MALAYSIAKINI,
HTTP://WWW.BERSIH.ORG/

44. The DFAT Report refers to political rallies in Malaysia as follows::

Political Rallies

3.46 The government closely administers political rallies under the *Peaceful Assembly Act* and *Criminal Code*. The required permits can be difficult to obtain and can be restrictive in their application.

3.47 Many political rallies are held within Malaysia without incident or interference from law enforcement agencies. However, individuals have been arrested for organising or engaging in rallies in contradiction with the law and the Royal Malaysian Police have on occasion used excessive force to control crowds. Bersih, a coalition of 62 NGOs, organised a series of rallies calling for free and fair elections in 2007 (*Bersih 1.0*), 2011 (*Bersih 2.0*) and 2012 (*Bersih 3.0*). The rallies attracted thousands of protesters and were supported by opposition parties in the Pakatan Rakyat (People's Alliance). While the Government declared the July 2011 Bersih protest to be illegal, many thousands still participated. The police used tear gas and water cannons to break up the protest and made approximately 1500 arrests. Government approval was granted for the 2012 rally and several thousand people participated, however, when protesters moved beyond the approved protest site, the police used water cannons and tear gas to disperse the crowd and arrested approximately 500 people, including 25 women and five youth. In May 2013, the opposition PKR organised nationwide demonstrations known as the "Black 505" rallies, disputing the results of the May 2013 general elections. The rallies attracted thousands of people and took place with little interference from authorities. However, police subsequently arrested and charged a number of alleged organisers under the *Peaceful Assembly Act* for failing to provide the required ten days notice for public assemblies. Reports on the number of organisers arrested range from between six to forty individuals.

3.48 Overall, DFAT assesses that protesters face a low risk of arrest when engaged in political rallies. Such individuals have commonly been released on bail shortly following their arrest. Organisers of political rallies face a low risk of being charged under the *Peaceful Assembly Act* or *Criminal Code*.

45. The applicant also referred to concern relating to the authorities' use of *The Seditious Act*.

The DFAT Report indicates that;

The *Seditious Act*, *Official Secrets Act*, *Printing Presses and Publications Act* and criminal defamation laws have been used in Malaysia to restrict political speech.

...

A small number of high-profile opposition leaders or organisers have faced official harassment through the application of Malaysian law, particularly the *Peaceful Assembly Act*, *Seditious Act*, *Criminal Code* and occasionally, sodomy or corruption charges.

...

DFAT assesses that high-profile opposition leaders are at risk of official discrimination however general opposition party members are able to undertake political activities and are not at risk of official discrimination on a day-to-day basis. While a spike in interparty and societal violence occurred in connection with the 2013 elections, such incidents are not a common occurrence and individuals with political affiliations do not live in fear of violence on a day-to-day basis.

46. The applicant does not have and does not claim to have a high profile politically or in any other way.
47. On the basis of the above country information and the applicant's evidence regarding his political involvement, I find that he would not face a real chance of serious harm now or in the reasonably foreseeable future as a result of his actual or imputed political opinion if he were to return to Malaysia.

Race

48. The applicant did not expressly claim fear of persecution on the basis of his Chinese ethnicity. However as he referred to concern about racism in Malaysia I have considered whether as an ethnic Chinese he would face serious harm if he were to return to Malaysia.
49. I accept that the applicant belongs the minority ethnic Chinese in Malaysia.
50. The Australian Department of Foreign Affairs and Trade (DFAT) Country Report, Malaysia, 3 December 2014 provides that the ethnic Chinese in Malaysia:

...constitute one of the largest overseas Chinese communities in the world and are the second largest ethnic group in Malaysia. There are no laws or constitutional provisions that directly discriminate against ethnic Chinese in Malaysia.

Malaysian Chinese make up a high percentage of the professional and educated class and dominate business and commerce sectors. The majority of ethnic Chinese are concentrated in the west coast states of Peninsula Malaysia with significant percentages (30 per cent and above) living in the large urban centres, including Kuala Lumpur, Penang, Johor, Perak and Selangor.

Malaysian Chinese freely participate in political life and are represented by ministers in the current cabinet and in opposition parties. The largest Chinese party was traditionally the Malaysian Chinese Association (MCA), a component of the Barisan Nasional (BN) coalition. The MCA won seven seats at the 2013 election, down from 15 in 2008. An increasing number of Chinese support the Democratic Action Party (DAP), one of three key opposition parties of the Pakatan Rakyat (People's Alliance) coalition. The DAP won 38 seats at the 2013 election, a significant increase from the 28 seats in 2008. There are comparatively fewer ethnic Chinese in the Malaysian civil service. The exclusive use of the Malay language may be a restriction in this regard.

Malaysian Chinese generally have no problems in accessing public primary or high school education. However, despite the removal of government-sanctioned ethnic quotas for public universities in 2002, admission decisions remain heavily biased towards ethnic Malays. Malaysia's matriculation programs favour *bumiputera* students applying for entrance to state universities. Some ethnic Chinese are not awarded a place in public universities despite having perfect high school matriculation scores. Since the formation of private universities in Malaysia, ethnic Chinese have consistently formed the bulk of the students within Malaysia's non-government universities.

DFAT assesses that ethnic Chinese generally do not experience discrimination or violence on a day-to-day basis. However, they may face low levels of discrimination when attempting to gain entry into the state tertiary system or the civil service.

51. On the basis of the above country information, I do not find that there is a real chance the applicant would face any harm because of his Chinese ethnicity now or in the reasonably foreseeable future if he were to return to Malaysia.

52. In sum, I am not satisfied that there is not a real chance that the applicant would face serious harm, now or in the reasonably foreseeable future, because of his Chinese ethnicity, his actual or imputed political opinion, fear of *The Sedition Act*, police corruption or any other Convention reason.

Are there 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 he will suffer significant harm?

53. I have also considered whether the applicant meets the complementary protection criterion under s.36(2)(aa).
54. For the reasons set out above, I have not accepted there to be a real chance that [the applicant] faces serious harm from the Malaysian authorities or anyone else if he returns to his home in Malaysia, now or in the reasonably foreseeable future. In *MIAC v SZQRB*, 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. As I have found that the applicant does not face serious harm, I am not satisfied there is a real risk that he will face significant harm. Accordingly I am not satisfied on the evidence before me 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 he will suffer significant harm as defined in subsection 36(2A) of the Migration Act.

CONCLUSIONS

55. For the reasons given above I am not satisfied on the evidence before me that [the applicant] is a person in respect of whom Australia has protection obligations. Therefore [the applicant] does not satisfy the criterion set out in paragraph 36(2)(a) or (aa) of the Act for a protection visa. It follows that he is also unable to satisfy the criterion set out in paragraph 36(2)(b) or (c) of the Act. As he does not satisfy the criteria for a protection visa, he cannot be granted the visa.

DECISION

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

George Haddad
Senior 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 their 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.

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36 Protection visas – criteria provided for by this Act

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- (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.

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