

1500288 (Refugee) [2016] AATA 4237 (2 August 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1500288
COUNTRY OF REFERENCE:	Malaysia
MEMBER:	James Jolliffe
DATE:	2 August 2016
DECISION:	The Tribunal affirms the decision not to grant the applicants Protection visas.

Statement made on 02 August 2016 at 10:59am

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicants Protection visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants who claim to be citizens of Malaysia, applied for the visas [in] March 2014 and the delegate refused to grant the visas [in] December 2014. The Tribunal notes that Section 48A of the Act imposes a bar on a noncitizen making a further application for a protection visa while in the migration zone in circumstances where the noncitizen has made an application for a protection visa which has been refused. The Full Federal court in *SZGIZ v. MIAC* (2013) 212 FCR 235 has held at[38] that the operation of section 48A, as it stood at the time of this application, is confined to the making of a further application for a protection visa which duplicates an earlier unsuccessful application for a protection visa, in the sense that both applications raised the same essential criterion for the grant of a protection visa. Applying the reasoning in *SZGIZ v. MIAC* the Tribunal finds that it does not have power to consider the refugee Convention criterion in s.36(2)(a), and has proceeded on the basis that it can only consider the applicant's claims under the complementary protection provisions in s.36(2)(aa) of the Act. The immigration history of the first named applicant is set out in the Department delegates decision record which was provided to the Tribunal with the application for a review. That record indicates that the first named applicant applied for a protection Visa in August 2002 and that application was refused and the RRT subsequently affirmed that decision in January 2003. The applicant subsequently sought a review in the then Federal magistrates Court and that court dismissed that application in July 2006. The record also indicates that several applications for ministerial intervention were made by the applicant and those applications were unsuccessful. The record also indicates that the applicant has overall remained unlawfully in Australia for about six years since arriving in Australia in July 2002. The applicants have [children] who were born in Australia and have Australian citizenship.
3. The first named applicant made claims for protection and the second named applicant did not make any separate claims for protection but sought protection in Australia on the basis of being a member of the same family unit as the first named applicant. On that basis the Tribunal will refer to the first named applicant as "the applicant" in these reasons.
4. The first named applicant appeared before the Tribunal on 28 July 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.

Relevant Law

5. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the *Migration Regulations 1994* (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa of the same class.
6. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as

amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

7. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
 - owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
8. 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').
9. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration – PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CLAIMS AND EVIDENCE

10. The Tribunal has before it the Department and Tribunal files relating to the applicants together with relevant information from a variety of sources.
11. The issue in this case is the applicant's claimed to fear harm on the basis of their Chinese ethnic extraction if they returned to Malaysia.
12. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed
13. In his protection Visa application which was lodged in March 2014 the applicant claimed that he had been born in Malaysia in [date]. He claimed that he had married in Malaysia in December 1999. He claimed to have no right to enter or reside either temporarily or permanently in any other country apart from Malaysia. He claimed to have arrived in Australia on a [temporary] Visa in July 2002. He claimed to have been issued with a Malaysian passport in [2002]. He claimed to have travelled to a number of countries in Asia between February and June 2002. He claimed to have been educated for [number of] years in Malaysia and finished at primary school level. He claimed to have worked as [occupation] in Malaysia between [year] and 2002 and that the [business] was owned by his family.
14. In his protection Visa application the applicant said that he left Malaysia because "official discrimination against Chinese" had made it difficult to "run our business". In summary he claimed that local Muslims in Malaysia did not want the applicant and his family to sell [product] and he claimed that a local Muslim person who owned a [business] had offered to buy the business. The applicant claimed that he and his family had rejected the offer and

that as a result his shop was broken into and ransacked and he claimed that when he reported the incident to the police, the police did nothing. He claimed that his family had also received threatening letters and that he had reported that to the police and he claimed the police again did not investigate the matter. He claimed that the Malaysian authorities would not protect Chinese against Muslim people. He claimed that he and his family could not conduct their business and that affected their livelihood and they decided to leave Malaysia because they could not continue to suffer "such degrading treatment".

15. The applicant claimed that if he and his family returned to Malaysia they would suffer degrading treatment because of the Malaysian government's official discrimination against Chinese people. He also claimed that he would have to register his [children] who had been born in Australia if he returned to Malaysia and he claimed that he would be required to pay fees and substantial bribes or wait years before his children could go to school and access government services and benefits. He claimed that it was official government policy in Malaysia to discriminate against Chinese people and Muslim people hate the applicant and his family because they are Chinese and they are Buddhists.
16. He claimed that he feared for his children because they are Australian citizens if they returned to Malaysia. He claimed that his children would suffer racial and religious vilification and that they would have great difficulty in adapting to life "in Australia (sic)" and that their education would be interrupted and not in their best interests to leave Australia and live in Malaysia. He claimed that if the family returned to Malaysia that they would be discriminated against because they are Chinese and that Malaysian authorities and local Muslim people would harass them and expect bribes to be paid. He claimed that because of their Chinese extraction they might have crimes committed against them and that the police would not seriously investigate those issues. He claimed to fear that his children would suffer degrading treatment and that they would be negatively impacted in their personal development in their education and future prospects and would have difficulty adapting to a new environment in Malaysia. The applicant in documentation provided in support of his protection Visa application referred to having other family members in Malaysia. The applicants provided their Malaysians passports in support of their protection Visa applications.
17. The department received written submissions dated March 2014 from the applicant's representatives. In summary those submissions referred to the applicants seeking protection in Australia on complementary protection grounds. The submissions refer to United Kingdom Supreme Court authority to support a submission to the effect that the removal of the applicants would amount to the constructive removal of the children of the applicants to Malaysia. The submissions also refer to the Convention on the rights of the child and submit that Convention applies to the applicants children. In summary the submissions refer to various articles in that Convention and also suggest that there is a range of other obligations under the International covenant on civil and political rights that had to be considered in relation to the applicants protection Visa application. The submissions in summary submit that "on compassionate and humanitarian grounds, I respectfully submit that it is in the best interests of the children that this family remain in Australia".
18. The Tribunal notes that there are a number of documents that were provided to the Tribunal in support of requests for ministerial intervention and these include photographs of the applicant's family in Australia as well as a number of references from various people in relation to the applicants work activities in Australia as well as personal references in relation to the applicant's family. The Department was also provided with documents in relation to the applicant and his family's activities in the Australian community and including his [children's] school activities and social activities. The Department was also provided with documents in relation to the applicant's study and research in relation to [a certain field] in Malaysia. The applicant provided a document detailing his skills and work experience which

indicated that before he left Malaysia's main interest had been in [a certain business] but that the course that [the business] was seasonal he also had a second occupation as a [occupation] and had done [certain] work and including [occupation] for a number of years. That document was dated May 2009. The Department had also been provided with birth certificates in relation to the applicant's [children] and a copy of a marriage certificate in relation to the first and second named applicants. There was also a document from [a certain church] referring to the applicant's family, his wife and children having attended [church] meetings and community activities and participating in religious studies. That letter is dated May 2009 and refers to the second named applicant learning Christianity and wanting to be a Christian and undertaking Bible studies.

19. The applicant was interviewed by a department delegate in relation to his protection Visa application. That interview occurred [in] October 2014. The delegate declined to grant the applicant a protection Visa and did not accept a number of the applicants claims and was not satisfied that the applicant was entitled to protection in Australia. As indicated the Tribunal was provided with a copy of the delegates record of decision with the application for a review.
20. The Tribunal received documentation from the client's representative on 27 July 2016. The documentation included written submissions which in summary referred to the applicants background and referred to the applicants having [children] who were born in Australia and are Australian citizens and the consequences for the family if the applicants were refused protection in Australia. The submissions refer briefly to the applicants claims as to why they feared harm in Malaysia. The documentation forwarded included materials in relation to the applicants [children] and including school photographs. The Tribunal was also provided with financial information and other documentation in relation to the business activities of the applicants. The written submissions in summary make some criticisms of the Department delegates assessment of the applicants claims it also claimed that the applicants have a "unique case" for the consideration of the Tribunal. The Tribunal was also provided with a further copy of a letter of support from the [church] dated May 2009.

TRIBUNAL HEARING

21. The first named applicant appeared before the Tribunal to give evidence and present arguments on 28 July 2016. The first named applicant said that the second named applicant was sick and not able to attend the hearing. The applicants registered migration agent did not attend the hearing. The hearing was conducted with the assistance of an interpreter. The first named applicant confirmed that he had no difficulties in participating in the Tribunal hearing. He produced a Malaysian emergency travel document to the Tribunal.
22. The applicant confirmed his name and personal particulars. The Tribunal told the applicant that it was only assessing his case in terms of the Complementary protection provisions in the Migration Act and the basis for that decision. He told the Tribunal he had no comments to make relation to that decision by the Tribunal.
23. The Tribunal sought to confirm the applicant's grounds for seeking protection in Australia. He confirmed that he was seeking protection on the basis of fearing harm if he returned to Malaysia because of his Chinese racial extraction and he also claimed to fear harm if he returned to Malaysia on the basis of his Buddhist religion. He had also claimed in his protection Visa application that he was fearful for the future of his [children] if he returned to Malaysia.
24. the Tribunal noted that it had been provided with further brief written submissions and other documentation on 27 July 2016 on the applicant's behalf. The applicant confirmed that he had family still in Malaysia and that he remains in touch with his mother every few weeks. He

told the Tribunal he conducted a business in Australia and was involved in [certain work] and the Tribunal had been provided with documentation in relation to the establishment and conduct of that business. The second named applicant does not work outside the family home.

25. The Tribunal in discussing the applicant's claims for seeking protection in Australia found it difficult to get clarity from the applicant around his claims in relation to fearing harm on the basis of his Buddhist faith. The Tribunal also discussed with the applicant the basis for his claim to fear harm if he returned to Malaysia because of his Chinese ethnic extraction. The applicant told the Tribunal that he was fearful because of the attacks that he claimed had been carried out on a business/shop that his wife had conducted in Malaysia. The applicant said that his wife had been told not to sell [product] in her shop. He told the Tribunal that there had been another family who ran another shop nearby and that they had offered to buy the business conducted by his wife but had not offered sufficient funds. He told the Tribunal that the threats of harm had come from the other family. He was unable to name this family notwithstanding that the Tribunal asked him on several occasions if that family was the "[name] family"(the current Tribunal notes that was the name of the family that the applicant had previously given to the RRT when it had considered the applicant's earlier protection Visa application in 2003). The applicant said he had forgotten the name of the family whom he claimed he feared harm from if he returned to Malaysia. He told the current Tribunal that family were the only ones who had told his wife and he not to sell [product] in his wife's shop.
26. He told the Tribunal that the reason why he and his wife had left Malaysia was because he and his wife had been harassed. He also said that [his children] had been born in Australia and were now attending high school and he was fearful that if they returned to Malaysia they would have to commence their studies again and that their progress would be delayed and that they would also be discriminated against because of their Chinese ethnic extraction. He confirmed to the Tribunal that the only harassment that he had faced in Malaysia had come from the family who had offered to buy his wife's business. He told the Tribunal that no Malaysian government officials had ever harassed him or harmed him.
27. The Tribunal asked the applicant who he feared harm from if he returned to Malaysia and the Tribunal had difficulty in getting the applicant to clarify the basis for his fear other than he nominated the family that he claimed had previously harassed him. He told the Tribunal that he was not sure now if there would still be a difficulty in terms of harm from the family if he returned(given the passage of time) but he claimed that family had still been looking for the applicant in 2002. He told the Tribunal that he had never been physically harmed in Malaysia nor had any members of his family and that he had not had any religious difficulties in Malaysia in practising his Buddhist faith.
28. He told the Tribunal that he had come with his wife to Australia [and] had then heard about the protection Visa application process in Australia and had made an application which had been unsuccessful. The applicant gave this evidence in the context of the Tribunal asking the applicant about his travel outside Malaysia to various countries and the Tribunal having noted that the applicant had not sought to seek protection in those countries. He confirmed to the Tribunal that he had remained unlawfully in Australia for a total of about six years but could not remember precisely how long he had remained in Australia unlawfully after his first protection Visa application had been rejected. He told the Tribunal that it "should be" about six years but he could not remember precisely. He confirmed to the Tribunal that he had obtained his passport in Malaysia and travelled from Malaysia without any difficulties. He confirmed that he had travelled to a number of countries in the Asia-Pacific region between February and June 2002. In discussing his protection Visa application and his decision to apply for protection in Australia he said that he had not heard anything about seeking protection in [a country](where he had travelled before coming to Australia) but had heard

that it was possible to seek protection in [another country] and in Australia. He said [the other country] was too cold and that the climate was better in Australia.

29. The Tribunal in discussing the applicant's claims to fear harm on the basis of religion asked about the documentation that had been received from the [Australian church] which indicated or suggested that the second named applicant was seeking to become a Christian. The applicant said that he and his family had initially attended at the [church] to get assistance in relation to obtaining a Visa and said that his wife was initially interested in Christianity but was no longer interested in Christianity and that the family had not attended any [church] religious activities for a long time and that the family had ceased those activities many years ago. In discussing his religious beliefs the applicant said that he did not practice as a Buddhist in Australia and that he was now an atheist and he had become an atheist since he came to Australia. He told the Tribunal that he did not think his wife and children followed any religion in Australia.
30. The Tribunal asked the applicant about the completion of his protection Visa application. He told the Tribunal that he thought his agent had written the answers based on information provided from the applicant but he did not know if the answers that had been provided in the application were correct. The Tribunal referred the applicant to the claims made in the protection Visa application. The Tribunal noted that the applicant had described his occupation as [occupation] and he said that was correct and he said he worked a family [business] which in fact he had owned and had sold since he had been in Australia. He said he also worked as a [occupation]. He said he sold the [business] about two years ago (in terms of the Tribunal hearing) and had received the equivalent of about AU\$[amount] for the [business] and he used those proceeds to purchase a home in Australia. The Tribunal noted that there had been no reference in the protection Visa application or other documents completed by the applicant to him conducting a business in terms of a shop. He said the agent had completed the documentation. He said the shop was run by his wife but the applicant was unable to provide any details about the name of the shop and when questioned said that the shop was in his hometown and he had difficulties initially recalling details about the business. He told the Tribunal it was a business conducted in the street and the Tribunal initially thought it was a street vendor store (based on the applicant's evidence). The applicant was eventually able to provide more details to the Tribunal about the business and he described it as being a physical building in the street which his wife had conducted for more than a year and the business sold [certain items]. He said the building had a few [furniture] in it and could accommodate about [number] people [and] the business had a door and had wire on the window openings. He said the business was successful. He said the difficulties about the business with the other family had commenced about a year after the shop had opened and he thought that was in early 2000 and that the troubles with the family had started around 2001. He said he and his wife closed the business at the end of 2001. He could not provide any documents to the Tribunal about the business he claimed had been conducted in Malaysia and as indicated was unable to tell the Tribunal the name of the business.
31. He told the Tribunal that he had not had any difficulties from authorities in running the family [business] in Malaysia. He also told the Tribunal that there had been no official discrimination by Malaysian government authorities against the family in conducting the shop. The Tribunal had questioned the applicant about this issue on the basis of the claim in his protection Visa application that there was official discrimination against Chinese people running businesses in Malaysia. The applicant referred to the sale of [product] in his wife's shop and said that Malaysians did not like Chinese people selling [product]. The Tribunal asked the applicant for details about his claims in relation to the threats that he claimed were made based around the sale of [product] and found it difficult to get details from the applicant. He eventually told the Tribunal that the threats were made to his wife and that they were to the effect that they were not to sell [product] or they would be "driven out or driven away". He

was asked further questions about what had happened to the shop in Malaysia and the threats and he said that the threats had been made to his wife but at a later stage the front door of the shop had been sealed and the words "Chinese go away" had been written on the wall near the door of the shop. The Tribunal asked him about the claims that the shop had been broken into and ransacked and he said that the door or front gate had been broken and the chairs and tables inside the business had been flipped over. He claimed he went to the police to report the incident and initially claimed that the police have done nothing but then told the Tribunal that the police had done an investigation by coming to the shop and looking around but had then left the shop and nothing further had been done (he claimed) by the police in relation to the incident. The applicant claimed he had also reported the threatening telephone call to the police.

32. He was asked about the claim that the family had received threatening letters. He initially said that was correct but then said the family had received a phone call and it had been one phone call which had been made to the applicant and he claimed in that conversation words to the effect "continue to report to police and your legs will be broken" were said to him. The applicant's evidence to the Tribunal was that no threatening letters were received but he received one threatening telephone call and words had been directly spoken to his wife in relation to threats based on the sale of [product] in the family business. He claimed that the family who had offered to buy the business were the ones responsible for ransacking the shop but in essence he told the Tribunal he suspected that was the case. He told the Tribunal that the family had only told his wife not to sell [product] or they would be driven away. He told the Tribunal he had never actually been threatened by the family in a face-to-face situation other than he had received a telephone call that he referred to in his evidence.
33. The Tribunal asked the applicant further questions about his claims in his protection Visa application and in particular in relation to his claim that there was official discrimination in Malaysia against people of Chinese ethnic extraction. The Tribunal overall found the applicant vague in relation to discussing this aspect but told the Tribunal that in explaining that claim that Chinese people had difficulties in obtaining government contracts from the Malaysian government and the contracts went to ethnic Malay people and the Chinese people were discriminated against on that basis. He also said that if a Chinese person wanted to open a company then they needed to have ethnic Malaysians people involved in the company to allow the registration of the company. He also said that if Chinese people wanted to go to University in Malaysia they were disadvantaged in terms of (effectively) quotas that gave preference to ethnic Malaysian people. They were the issues raised by the applicant in responding to Tribunal questions about his claims that there was official discrimination in Malaysia against people of Chinese ethnic extraction. He was asked further questions about his claims that his children would be discriminated against in Malaysia and that he would have to pay bribes in order to get them educated. He told the Tribunal that he could not remember claiming that the children would not be educated unless he paid bribes and the Tribunal referred to his protection Visa application and the claims in the application. The applicant told the Tribunal that his [children] who had been born in Australia had been registered as Malaysian citizens and initially given Malaysian passports (which apparently now had expired). In those circumstances the Tribunal asked about the applicant's claims that his children would have difficulty if they returned to Malaysia. The Tribunal referred to information contained in the DFAT country report for Malaysia dated July 2016 which referred to the education system in Malaysia and noted that information did not support the applicant's claims that his children would be disadvantaged or discriminated against if they returned to Malaysia in terms of their access to educational facilities and opportunities as they were already Malaysian citizens.
34. The Tribunal asked the applicant if he feared harm in his immediate home area if he returned to Malaysia why he could not relocate elsewhere in Malaysia to avoid that harm.

The applicant said that he preferred to stay in Australia but then told the Tribunal that if he had to return he thought he could relocate without difficulty to avoid harm.

35. The Tribunal also asked the applicant what would happen as far as his family relocating to Malaysia if he had to return to Malaysia. He told the Tribunal that he and his wife would return to Malaysia if they were required but that they would leave their [children] in Australia and the Australian government could make arrangements in relation to the [children] remaining in Australia. The Tribunal asked the applicant why the Australian government should be responsible when he and his wife were the parents. He said that his [children] were Australian citizens. He said he had one other relative in [city] but he does not associate with that person who is a [relation]. He said if his [children] returned to Malaysia with he and his wife that they would have to restart their education and that would affect their studies and academic achievements.
36. The applicant was asked if he had ever paid bribes in Malaysia. He said that he had been asked to pay bribes in relation to traffic offences and when applying to be paid benefits in relation to his [business]. He said he paid the bribes to get things resolved. He said he considered that Chinese people had to pay bribes to get things resolved in Malaysia. He was asked about his claim in his protection Visa application that local Muslims in Malaysia expected bribes to be paid by people of Chinese ethnic extraction. He told the Tribunal that claim was about government officials expecting to receive the payment of bribes in Malaysia.
37. He was asked if he had any further issues to raise with the Tribunal in relation to his claims and he said that if he and his wife returned to Malaysia his family would be parted. He said he had lodged his tax returns in Australia and set up a home in Australia and wished to remain in Australia. He also asked the Tribunal if it would consider referring his case to the Minister for ministerial consideration if the Tribunal decided to reject the applicant's claims. The Tribunal said that the applicant could seek ministerial intervention if the Tribunal decided not to make a recommendation in relation to that issue.
38. The Tribunal raised information that it had pursuant to Section 424AA of the Act. That information was information contained in the RRT decision of 28 January 2003. The Tribunal said that information would be a reason or part of a reason why the Tribunal could affirm the decision under review. That information was the information relating to the identity of the family that the applicant claimed to fear harm from if he returned to Malaysia and as indicated elsewhere in these reasons the applicant on that occasion had specifically identified the family but had been unable to identify the family to the current Tribunal. That information was relevant to the current Tribunal in that the current Tribunal may take the view that it did not seem credible that the applicant would be unable to name the source of his fear of harm in Malaysia if he returned to Malaysia but had been able to name a particular family on the previous occasion before the RRT. The applicant was asked if he wished to comment or respond to that information and he said he did not wish to comment or respond and he was not seeking extra time or additional time to comment or respond.
39. The Tribunal referred to country information contained in the DFAT country report for Malaysia dated December 2014 and the DFAT Country report dated July 2016. The Tribunal noted that the 2016 report indicated that Malaysia was ranked 54 out of 168 countries and territories on transparency International's 2015 corruption perception index. The Tribunal noted that the report indicated that the threat of crime and terrorism in Malaysia is relatively low and the security situation is generally stable. Protests and demonstrations occur from time to time but are not frequent. The report referred to Chinese Malaysians. The report notes that ethnic Chinese have traditionally dominated the private economy and that Malaysian Chinese constitute one of the largest overseas Chinese communities in the world and are the second largest ethnic group in Malaysia. Malaysian Chinese make up a high percentage of the professional and educated class and dominate business and commerce

sectors. Malaysian Chinese freely participate in political life and are represented by ministers in the current cabinet and in opposition parties. The Department assessment is 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. The Tribunal during the course of the hearing had referred the applicant to information contained in the 2016 DFAT country report in relation to the education system in Malaysia and in particular in relation to those parts of the report the referred to educational facilities for Malaysians from a Chinese ethnic extraction.

40. The July 2016 country report indicates that Buddhists represent almost 20% of the total population and that the majority of the Buddhist community is Malaysian Chinese. The Department assessment is that Buddhists and Hindus are normally able to practice their religion without interference and do not face official or societal discrimination on a day-to-day basis.
41. The 2014 and 2016 reports refers to political opinion in Malaysia and notes that instances of interparty and societal violence were reported in the run-up to the May 2013 national elections. The Department assessment is 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. The 2016 report indicates that the department assessment is that political opposition and dissent in particularly direct criticism of the government can result in legal harassment, detention and even prosecution.
42. The report notes that the government closely administers political rallies and issues permits in relation to those rallies. The report notes that many political rallies are held within Malaysia without incident or interference from law enforcement agencies. The report refers to rallies that were held in relation to calling for free and fair elections. The report refers to a rally in 2007 which is described as Bersih 1 and rallies in 2011 and 2012 (Bersih 2 and 3 respectively). Those rallies attracted thousands of protesters. The government declared the July 2011 protest to be illegal but many thousands still participated. The protest was broken up by the police and approximately 1500 people arrested. Government approval was granted for the 2012 rally and again police were involved in breaking up the rally when the protesters moved beyond the approved protest site. Approximately 500 people were arrested on that occasion. The Department assessment is that protesters face a low risk of arrest when engaged in political rallies. The Department assessment is also that human rights defenders critical of the government may be subjected to legal harassment or surveillance by law enforcement authorities. The report notes that credible sources have informed the Department that more often than not when human rights defenders were arrested the charges were dropped and individuals were released within short timeframes. The report notes that harassment at the individual level was commonly targeted at activists with a public profile but not always at the highest level of an organisation.
43. The report notes that the Royal Malaysian police is considered by credible local sources to be an effective force with reasonable capacity levels. However the force has also had a demonstrated history of using excessive force. The report notes that the Department assessment is that the Royal Malaysian police generally observe legal requirements attached to pre-trial detention. The report notes that credible local and international sources consider the Royal Malaysian police to be a professional and effective police force and that it is responsible for law-enforcement nationwide. However the quality of the police response varies depending on levels of training, capacity or engagement in corruption. The report refers to a number of initiatives that have been introduced in Malaysia in an effort to deal with an identified perception of widespread corruption within the police.

44. The report notes that the Department assessment is that Malaysians can and do freely relocate internally within Malaysia and that the Constitution provides for freedom of internal movement but that the eastern states of Sabah and Sarawak have autonomy over their own immigration controls.
45. The applicant said that he did not agree that the security situation in Malaysia is generally stable and he referred to robberies and removal of crosses from Christian churches in relation to that aspect. The Tribunal noted that the country report indicated Malaysia was a secular country but that the Constitution makes Islam the religion of the Federation. The Tribunal also noted information contained in the country report regarding the implementation of quotas that favoured ethnic Malaysian students in relation to the admission to university and that there were also programs and policies implemented by the Malaysian government to boost the economic position of ethnic Malays and other indigenous groups. In responding to the applicant's comments regarding the security situation the Tribunal further noted that while petty crime is common, violent crime is relatively uncommon according to the country report.
46. The Tribunal raised with the applicant concerns that it had about his claims and his evidence. The Tribunal said it had concerns about the credibility of a number of the applicants claims that he feared harm in Malaysia and referred to its concerns that it did not seem credible that the applicant was unable to name the family that he claimed was the source of his fear of harm notwithstanding that the Tribunal had raised the name that he had referred to the RRT in relation to his previous protection Visa application. The Tribunal noted that in a number of respects the DFAT country information did not support a number of the applicants claims and that was particularly the case in relation to the provision of educational services that would be available to his [children] if they returned to Malaysia. The Tribunal also noted that the applicant's claims in his protection Visa application were relatively brief and provided little detail about the claimed events and issues. The Tribunal during the hearing noted that the applicant struggled on occasions to provide details in support of some aspects of his claims. The Tribunal said that some claims made by the applicant did not appear to be supported by his evidence to the Tribunal and that was particularly so in relation to claims that he had about his children's situation if they returned to Malaysia in the context that the applicant's evidence was that his [children] were Malaysians citizens. The Tribunal said that it appeared that the applicant's claims were more based around a concern about his children's living arrangements and study arrangements and their future prospects if they returned to Malaysia rather than the applicant actually fearing harm in Malaysia if he returned.
47. The applicant in responding to the Tribunal's concerns said that he agreed with those concerns. The Tribunal asked if he understood the Tribunal's concerns and sought confirmation regarding his comment and he again told the Tribunal that he agreed with the Tribunal's concerns about his claims and his evidence.
48. The applicant did not seek any additional time to lodge any further documents or submissions to the Tribunal.

CONSIDERATION OF CLAIMS AND EVIDENCE

49. On the basis of the materials and information provided to the Department and to the Tribunal the Tribunal accepts that the applicants are Malaysian citizens and, without evidence to the contrary, that the second named applicant is a member of the same family unit as the first named applicant. The Tribunal accepts, without evidence to the contrary, on the basis of the information and materials provided to the Department and available to the Tribunal that the applicants do not have a right to enter or reside temporarily or permanently in any other

country apart from Malaysia. The Tribunal accepts that Malaysia is the applicants receiving country for complementary protection purposes.

50. The Tribunal is not satisfied on the basis of the evidence and materials before it that the applicant faces a real risk of significant harm should he be returned from Australia to Malaysia. The Tribunal is also not satisfied as to the first named applicant's credibility in relation to some aspects of his evidence and to some aspects of his claims. The Tribunal does not accept that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicants being removed from Australia to Malaysia that there is a real risk that the applicants would suffer significant harm on the basis of the claims.
51. The applicant's claims to fear harm if he returned to Malaysia are referred to elsewhere in these reasons. In essence the applicant's claims are based around his Chinese ethnic extraction and that he previously claimed to practice the Buddhist religion in Malaysia. He also claimed to fear harm on the basis of disadvantage to his [children] if the family returned to Malaysia.
52. In essence the applicant claimed that the source of his fear of harm were threats and harassment from another family who operated a business near the business that his wife operated in Malaysia. The applicant had made claims of official discrimination in Malaysia directed at people of Chinese ethnic extraction and the Tribunal has referred elsewhere in these reasons to the applicant's evidence as to those issues. The applicant said that he had paid bribes in relation to traffic offences in Malaysia as well as having paid a bribe in relation to getting government grants or subsidies or benefits in relation to the family [business] in Malaysia. He told the Tribunal that he had not faced any harm or harassment from Malaysian government officials in Malaysia. His evidence and claims regarding how his [children] would be disadvantaged in relation to their education and registration as Malaysians citizens if they returned to Malaysia were not consistent with the country information that has been referred to contained in the DFAT country report. The Tribunal accepts that the DFAT country report for Malaysia dated July 2016 contains recent and relevant information in relation to the applicants claims.
53. As indicated the applicant told the Tribunal that he was now an atheist. He told the Tribunal that he did not think that other members of his family practised any religion. He told the Tribunal he had not had any difficulty in practising his Buddhist faith when he was in Malaysia. The Tribunal also notes the DFAT country information that has been referred to which indicates that Buddhists are normally able to practice their religion in Malaysia without interference and do not face official or societal discrimination on a day-to-day basis. In those circumstances the Tribunal does not accept that the applicant faces a real risk of significant harm on the basis of his religious beliefs if he returned to Malaysia.
54. The Tribunal has considered the credibility of the applicant's claims and as indicated raised a number of concerns with the applicant during the course of the Tribunal hearing. As indicated the applicant told the Tribunal he agreed with the Tribunal's concerns about his claims and his evidence. The Tribunal is prepared to accept that the applicant and his wife conducted a business in Malaysia that provided [product] and other services. The Tribunal is not prepared to accept that the applicant and his wife suffered some harassment and threats as a result. The applicant was unable to name the family that he claimed was the source of the claimed threats and harassment and the Tribunal believes that it is reasonable for it to expect that the applicant would have had a clearer memory of the identity of this family if they had in fact threatened and harassed the applicant and his wife as the applicant claims. The applicant also claimed in his protection Visa application that the police in Malaysia had not investigated the threats and harassment but told the Tribunal that the police had in fact conducted an investigation by coming to the shop but that they had not done anything

further apart from physically visiting the premises. That evidence indicates to the Tribunal that the applicant has been inconsistent in relation to his claims about that aspect. The applicant was also inconsistent in relation to his claim that he had received threatening letters in relation to the shop selling [product] and reporting matters to the police. He told the Tribunal at the hearing that there had not been threatening letters but that there had been one threatening telephone call that had been made to him. That evidence was also inconsistent with the claims made in the applicant's protection Visa application. He told the Tribunal that the threats and harassment about the claims relating to the sale of the [product] had essentially been made to his wife. The Tribunal has considered the totality of the evidence and the applicant's claims in relation to his protection Visa application. The Tribunal notes that the applicant told the Tribunal that he agreed with the Tribunal's stated concerns that it raised during the Tribunal hearing about the applicant's claims and his evidence.

55. The Tribunal notes that the applicant on occasions was vague in relation to providing details in relation to some aspects of his claims. The Tribunal after considering the totality of the applicant's evidence does not accept that the applicant is a credible witness. The Tribunal after considering the totality of the evidence and its assessment of the applicant's credibility does not accept that the applicant or his wife received threats and harassment about the sale of [product] in the shop business in Malaysia. The Tribunal does not accept that the shop was ransacked or that the applicant and his wife received threats about reporting that claimed incident to the police. The Tribunal also does not accept on the basis of its assessment of the applicant's credibility that the applicant paid bribes in relation to traffic offences and in relation to obtaining benefits for his [business] in Malaysia. The Tribunal does not accept that the applicant faces a real risk of significant harm if he returned to Malaysia on the basis of his claims. Apart from not being able to tell the Tribunal the name of the family that he claimed to fear harm from in Malaysia he also told the Tribunal that if he returned to Malaysia now he was not sure that he would face any difficulties from that family. Apart from his claims that he had paid bribes in relation to traffic offences and in obtaining benefits for his [business] in Malaysia he did not claim that he had had any negative interactions with Malaysian authorities when he was in Malaysia. He had been able to obtain his passport and travel from and to Malaysia without difficulties. He did not claim that he had faced any difficulties with authorities when he had been conducting his [business] or his wife had been conducting the shop when they were in Malaysia. As indicated some aspects of the DFAT country information that has been referred to does not support the applicant's claims
56. The Tribunal's overall assessment after considering the totality of the evidence is that the applicant is primarily concerned that his family be allowed to remain in Australia in order for his [children] to continue their education in Australia. The applicant also told the Tribunal that he believed the future prospects of his children would be better if they remained in Australia.
57. The Tribunal has considered the applicant's request that the Tribunal refer this matter to the Minister for consideration for ministerial intervention but the Tribunal has decided not to make that referral. The Tribunal told the applicant during the hearing that if the Tribunal did not accept his claims for a protection Visa that he could make a request for ministerial intervention. The Tribunal believes that it would be more appropriate for the applicant to make that request. The Tribunal has considered the applicant's evidence that he and his wife if they returned to Malaysia would leave their [children] in Australia and that it would be a matter for the Australian government to make appropriate arrangements for the applicants [children] if that situation arose. The Tribunal is unable to ascertain if that is what the applicant and his wife would do if they returned to Malaysia.
58. The Tribunal has considered the applicant's claims individually and cumulatively. The Tribunal has considered the applicant's claims in terms of s.36(2)(aa) of the Act. The

evidence which has been considered and discussed and the relevant country information that has been referred to together with the Tribunal's assessment of the applicant's credibility did not cause the Tribunal to accept the applicant's claims to fear harm if he returned to Malaysia. The Tribunal does not accept that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Malaysia that there is a real risk that the applicant will suffer significant harm on the basis of his claims.

Overall Summary

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

DECISION

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

James Jolliffe
Member