

1503197 (Refugee) [2015] AATA 3621 (9 November 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division
CASE NUMBER: 1503197
COUNTRY OF REFERENCE: Malaysia
MEMBER: Susan Pinto
DATE: 9 November 2015
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 09 November 2015 at 9:26am

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. The applicant is a citizen of Malaysia, aged [age]. The applicant arrived in Australia [in] August 2013 as the holder of a [temporary] visa. He remained in the community unlawfully when his visa expired in November 2013 until he was granted a Bridging visa on the basis of the current application.
2. The applicant applied to the Department of Immigration for the Protection visa [in] October 2014. The applicant claimed that his family had a [business] in Malaysia and in February 2013 he reported to the police that some drug dealers were selling drugs at his [business]. This resulted in one of those persons, a gangster called “[Mr A]” being sentenced to death. As a result, the applicant was badly beaten and hospitalised for [several] days and his friend [Friend B] who was also attacked died of his injuries.
3. The delegate of the Minister for Immigration refused to grant the Protection visa [in] February 2015. The delegate stated that the applicant did not attend the interview and his claims were vague and lacking in detail. The delegate was not also satisfied that the applicant’s claims that a person called “[Mr A]” was arrested and executed within a period of a few months was credible, and also considered that the delay in the lodgement of the application indicated that the applicant did not genuinely fear harm in Malaysia. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
4. A summary of the relevant law is set out in an attachment to this decision. The issues in this review are whether the applicant has a well founded fear of persecution in Malaysia for one or more of the five reasons set out in the Refugees Convention and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of him being removed from Australia to Malaysia there is a real risk that he will suffer significant harm. The Tribunal must consider, therefore, whether the applicant has a well founded fear of persecution. If the Tribunal is not satisfied that the applicant has a well founded fear of persecution, the Tribunal must consider whether there are substantial grounds for believing that as a necessary and foreseeable consequence of him being removed from Australia that there is a real risk that he will suffer significant harm.

CLAIMS AND EVIDENCE

Application to the Department

5. When lodging the application to the Department, the applicant stated that he is from Selangor in Malaysia. He indicated that he speaks, reads and writes English and [another language]. The applicant indicated that he had 10 years of education in Malaysia and his occupation between [year] and August 2013 was “Sole Proprietorship”.
6. In response to a question on the application form as to why he left Malaysia, the applicant stated the following:

We had a family run [business]. I took over the responsibility in 2001. It was a good fun running that. One Saturday night on Feb 2013 I found some people with drugs distributing amounts to our [business] customers. I noticed them clearly and I wasted no time in calling police. Police came immediately and arrested them straight away red handed and were given big penalties. Later on it was found that it was the [relative] of famous drug dealer and gangster who was arrested from our [business]. His name was [Mr A] and later on Court gave him the punishment of hanged until death. After two months of his death in [2013] I was attacked by [several] people then

beated and my friend badly. They broke our [property] and my friend [Friend B] died due to serious injuries in head and I stayed in the hospital for [several] days. It was dangerous for me to live over there so I took visa immediately and came to Australia.

7. The applicant states that it was [on date] when he was attacked and he is afraid if he returns he will be attacked again and possibly killed. The applicant states that [Mr A] was the [relative] of a famous gangster and drug dealer [Mr C] who is a wanted criminal and the police caught [Mr A] and he was given the death penalty. The applicant believes that [Mr C] is very dangerous. He believes that it is known that he provided the information to the police and it resulted in [Mr C] losing his [relative]. Drugs worth thousands of *ringits* were also confiscated and they will seek to harm him as a result of this. The applicant does not believe that the police can protect him because the police were the ones who told [Mr C] about him. The applicant believes that the police are corrupt and do not take proper action against criminals and that is why [Mr C] and other drug dealers are still free. The applicant states that "in a nutshell I cannot trust the police and don't think they will be able to protect me".
8. The applicant was invited to attend an interview with the delegate. The invitation was sent to the applicant at his address in [Town 1] which he had provided to the Department. The applicant did not attend the interview.

Application for review

9. When lodging the application to the Tribunal, the applicant provided a copy of the delegate's decision record.
10. The applicant appeared before the Tribunal on 5 November 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the [detail] and English languages. At the hearing, the applicant's claims were discussed in further detail. The applicant's evidence and the Tribunal's assessment of the evidence is discussed below.

ASSESSMENT 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?

11. As stated above, the Tribunal must consider whether the applicant has a well founded fear of persecution in Malaysia for one or more of the five Convention reasons. For the following reasons, the Tribunal does not accept that the applicant is a truthful witness and considers that he has fabricated the entirety of his claims to fear harm in Malaysia.
12. The applicant firstly considers that the delay in the lodgement of the application is not consistent with the applicant's claims to have fled Malaysia due to a severe beating which resulted in him being hospitalised and his friend having died. The evidence, as discussed above, indicates that the applicant arrived in Australia in August 2013 on a [temporary] visa. When that visa ceased, the applicant remained in Australia unlawfully and it was not until October 2014, some 14 months after his arrival in Australia, that he lodged the current application. At the Tribunal hearing, the applicant was asked his reasons for coming to Australia; his circumstances following his arrival in Australia; and the reason for the delay. The applicant stated that when he first came to Australia he lived with a friend in [Town 1]. The applicant's friend has lived in Australia for some time, but the applicant does not know precisely for how long. The applicant lived in [Town 1] until about five months ago when he moved to [City] where he is now employed. The applicant stated that his purpose in coming to Australia was because his life was threatened. He did not know about protection visas but he came to Australia because he could stay with his friend. When asked whether he had

asked his friend how he might stay in Australia or told his friend about the problems he had in Malaysia, the applicant stated that he told him but his friend did not give him any advice as to what he would do. When advised that it is difficult to accept that he and his friend would not consider ways he could remain in Australia or that his friend would not know he could seek protection in Australia, the applicant stated that he did not know. The applicant was "lost" when he first arrived and needed money and to establish himself. It was only later that he looked on the Department's website and realised he could apply for protection in Australia.

13. The Tribunal does not accept the applicant's explanation for the delay in the lodgement of the application. The Tribunal considers that had the applicant been hospitalised in Malaysia for [several] days after a vicious attack which also resulted in his friend dying and he was frightened of drug dealers and gangsters that he would have sought to determine how he could lodge an application to remain in Australia soon after his arrival, particularly given that he knew someone in Australia who he could ask for assistance. The applicant's evidence instead indicates that he remained in Australia unlawfully for several months before lodging an application for protection. In the Tribunal's view, the considerable delay in the lodgement of the application is indicative of the fact that the applicant does not genuinely fear harm in Malaysia and his claims are fabricated.
14. The Tribunal also considers that other aspects of the applicant's claims and evidence are problematic. The Tribunal considers that his written claims were vague and without detail and, although he attended a hearing and was provided with an opportunity to expand on his claims, his evidence remained similarly vague and unpersuasive. The applicant told the Tribunal that in 2013 he was running a [business] and several people came into the [business] and he called the police because they were dealing in drugs. The police arrested them and the applicant was later told by a customer that the person was sentenced to death and although his customers told him that the person was executed he does not know if that in fact occurred. The applicant also claimed that he had to provide a statement to the police but it was only "a sentence". However, when asked what the statement said, the applicant indicated that the just said that he saw drug traffickers and he tried to stop them. When asked for more details as to what he said in the statement, the applicant again stated that he told them that the people were trading in drugs. He also stated that he does not know when the person was executed, even though he had indicated in his statement that after the person was executed it was when he and his friend were attacked. The applicant also could not recall when he was attacked and initially stated that he had "no idea". He then stated that it was in [month]. When asked why he could not recall the date of his attack, the applicant stated that it is "normal" not to remember such an incident. The applicant was also unable to state, apart from that he had bruises and "blood retention," the nature of the injuries he sustained, and although he was in hospital for [several] days he could not say the treatment he received whilst in hospital for his injuries. The applicant also did not know if any action had been taken by the family of his friend, [Friend B]" whom he had described in his statement as his best friend, who had been killed, or whether the matter was reported to the police. The applicant stated that his friend's family immediately fled the area after their family member was killed by the gangsters and he does not know what action, if any, they have since taken.
15. The Tribunal considers that the vague nature of the applicant's evidence in relation to when he was attacked, what had happened to the drug dealer who was executed, his evidence that he was simply "told" this by his customers, as well as his vague evidence as to the contents of his statement, are further indicative of the fact that the applicant's claims have been manufactured. The Tribunal also considers it not credible that the applicant has not bothered to make any inquiries in relation to actions taken by the family of his "best friend [Friend B]" and whether anyone had been charged or prosecuted in relation to [Friend B's] purported death. The Tribunal considers that had his friend been killed by those persons,

forcing the applicant to flee from Malaysia, he would have made efforts to determine whether any charges had been laid or any action taken by [Friend B's] family to ensure justice for [Friend B].

16. Importantly, the Tribunal considers that the applicant's evidence that, despite being beaten badly and his friend killed by gangsters and drug dealers, he did not ever seek assistance from the police in Malaysia to be not credible. The applicant claimed that although he was willing to immediately telephone the police when he observed drug dealers at his [business], and this resulted in the immediate arrest and subsequent sentencing to death of a person named [Mr A], he did not go to the police because the police are corrupt and do not assist ethnic Chinese people, and that they had told [Mr A's] family that the applicant had informed the police about his drug dealing. The applicant also told the Tribunal that he did not notify the police because it would not "work". The applicant stated that in Malaysia "money talks" and as an ethnic Chinese he will not be given police protection. He stated that the police are not reliable and are "useless" unless a person has contacts with the police. When advised of the country information which does not support his claims, the applicant stated that it is different in the place where he lived and the Tribunal cannot know the real situation in his area.
17. The Tribunal accepts that due to low pay and poor conditions, there is evidence of corruption within the Royal Malaysian Police (RMP). However, the evidence discussed with the applicant at the hearing indicates that Malaysia has a functioning judicial and police system and it is regarded as "effective and professional".¹ The evidence also indicates that following a Royal Commission into Police Integrity and Accountability, the government publicly acknowledged corruption and implemented reforms, including establishing compliance units within the RMP. Police officers were also subject to trial by criminal and civil courts and disciplinary action taken against officers, including suspension, dismissal or demotion.² The Tribunal does not accept that the evidence indicates that Chinese Malaysians are not afforded police protection, and the DFAT report indicates that they participate freely at all levels of Malaysian society and constitute one of the largest overseas Chinese communities in the world.³ As also discussed with the applicant during the hearing, drug dealers and such persons are regarded adversely in Malaysia and there are serious penalties in place for the treatment of such persons. The Tribunal does not accept that the applicant would consider that because he is ethnic Chinese he could not seek the assistance of the police if he was beaten, requiring hospitalisation for [several] days and his friend killed. The Tribunal considers that the applicant's evidence in relation to his claimed unwillingness to seek police assistance is further indicative of the fact that his claims have been manufactured.
18. Having considered all of the evidence, the Tribunal does not accept that the applicant is a truthful witness. The Tribunal considers that the applicant has fabricated the entirety of his claims. The Tribunal does not accept that the applicant reported some drug dealers to the police and this resulted in one of those persons, [Mr A], being sentenced to death and executed or confiscating drugs worth thousands of *ringits*. Nor does the Tribunal accept that the applicant was beaten or hospitalised or that his friend was killed by these persons. The Tribunal considers that the applicant left Malaysia for Australia for reasons entirely unrelated to those he has put forward. The Tribunal has not accepted the explanation for the delay and does not accept that the applicant failed to attend the Department interview because he did not receive the letter, as he claimed during the hearing. The Tribunal considers he did not

¹ Department of Foreign Affairs and Trade, *Country Report: Malaysia*, 3 December 2014. See also the US Department of State, Human Rights Report 2014, 'Malaysia', 25 June 2015, which states that Malaysia has a reasonably effective and impartial police and justice system.

² Department of Foreign Affairs and Trade, *Country Report: Malaysia*, 3 December 2014, p.20.

³ Department of Foreign Affairs and Trade, *Country Report: Malaysia*, 3 December 2014, pp. 8 -9.

attend because he has no genuine fear of harm and his purpose of lodging an application for protection is as a means of delaying his stay in Australia.

19. The Tribunal is not satisfied, therefore, that the applicant genuinely fears harm in Malaysia or there is a real chance that he will be harmed for a Convention reason if he returns to Malaysia now or in the reasonably foreseeable future.

Are there substantial grounds for believing that as a necessary and foreseeable consequence of him being removed from Australia to Malaysia that there is a real risk that he will suffer significant harm?

20. The Tribunal has also considered the applicant's claims, having regard to the Complementary Protection provisions. As indicated above, the Tribunal has not accepted any of the applicant's claims and has found that they have been fabricated in an attempt to delay his stay in Australia and he does not have any genuine fear of harm in Malaysia. For the same reasons as those set out above, the Tribunal is not satisfied, for the purposes of the Complementary Protection provisions, that there is a real risk that the applicant will suffer significant harm if he is removed from Australia to Malaysia.
21. The Tribunal finds, therefore, that there are not 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 would suffer significant harm in terms of s.36(2)(aa) of the Act, specifically that there is a real risk that he would be arbitrarily deprived of his life, that the death penalty will be carried out on him, that he will be subjected to torture, that he will be subject to cruel or inhuman treatment or punishment or to degrading treatment or punishment.

CONCLUSIONS

22. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
23. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
24. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

25. The Tribunal affirms the decision not to grant the applicant a Protection visa.

Susan Pinto
Member

ATTACHMENT - RELEVANT LAW

1. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

'(2) A criterion for a protection visa is that the applicant for the visa is:

- (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
- (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) 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 non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
- (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
 - (i) is mentioned in paragraph (a); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant; or
- (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
 - (i) is mentioned in paragraph (aa); and
 - (ii) holds a protection visa of the same class as that applied for by the applicant.

Refugee criterion

2. Subsection 5(1) of the Act defines the 'Refugees Convention' for the purposes of the Act as 'the Convention relating to the Status of Refugees done at Geneva on 28 July 1951' and the 'Refugees Protocol' as 'the Protocol relating to the Status of Refugees done at New York on 31 January 1967'. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

3. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a 'refugee' as a 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.'

4. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear 'persecution'. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve 'serious harm' to the person and 'systematic and discriminatory conduct'. Subsection 91R(2) states that 'serious harm' includes a reference to any of the following:
 - (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.

Complementary protection criterion

5. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. A person will suffer 'significant harm' if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to 'torture' or to 'cruel or inhuman treatment or punishment' or to 'degrading treatment or punishment'. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are further defined in subsection 5(1) of the Act.

Ministerial direction

6. In accordance with Ministerial Direction No. 56, made under section 499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration and Citizenship - '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.