



HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

Plaintiff M98/2025
Plaintiff

and

Minister for Immigration and Citizenship
Defendant

PLAINTIFF'S SUBMISSIONS IN RESPONSE TO QUERY FROM THE COURT

Part I: This reply is in a form suitable for publication on the internet.

Part II: Submissions

1. On 13 May 2026, the Court invited submissions as to whether the plaintiff's claims to the delegate that he could not access gender-affirming surgery in Malaysia were capable of giving rise to a protection obligation under s 36(2)(a) of the Act; or a claim for complementary protection under s 36(2)(aa) of the Act.
2. In short, "yes", being unable to access gender-affirming surgery in Malaysia could have founded successful protection and complementary protection claims in this case because:
 - a. inability to access gender affirming surgery denies him from expressing a fundamental part of his self-identity as a man;
 - b. inability to access gender affirming surgery exposes him to harm as a lesbian given his wish to change sexual preference and the fact same sex acts are illegal in Malaysia; and
 - c. inability to access gender affirming surgery in Malaysia arises in a context of exposure to the serious and significant harm faced by lesbians and transgender persons, such as re-education, harassment, violence, arrest and potential prosecution.
3. The delegate's error that the plaintiff did not want to undergo gender affirming surgery affected the path of reasoning fundamentally. The decision should be quashed and remitted for reconsideration. The plaintiff was deprived of the possibility of a successful outcome.

Section 36(2)(a) of the Act

4. Under s 36(2)(a), a criterion for the grant of a protection visa is that the applicant must be a non-citizen to whom the Minister is satisfied Australia has protection obligations because the person is a refugee. A person is a refugee if they satisfy s 5H of the Act which requires, inter alia, that the person have a well-founded fear of persecution in their country of nationality. Section 5J(4)(b) requires that any persecution which the person fears must involve 'serious harm'. Section 5J(5)(a) relevantly provides that a threat to a person's life or liberty may

constitute serious harm for the purposes of s 5J(4)(b). Section 5J (5) does not limit what constitutes “serious harm” but provides examples of some kinds of serious harm.

Section 36(2)(aa) of the Act

5. Section 36(2)(aa) of the Act provides that, for persons other than those to whom s 36(2)(a) applies, a criterion for being granted a protection visa is that the Minister must have substantial grounds for believing that the necessary and foreseeable consequences of the removal of an applicant from Australia include a real risk that they would suffer ‘significant harm’. Section 36(2A) relevantly provides that ‘significant harm’ includes the non-citizen being subjected to “degrading treatment or punishment.”¹

The plaintiff’s claims

6. The plaintiff raised the fact that he wished to change his sexual preference and have gender-affirming surgery in the course of the interview with the delegate.² The surgery was a means to an end rather than an end in and of itself: through the procedures, he could realise his dream to become a man,³ and could change his sexual preference. He said he feared harm in Malaysia because he could not have a sex change.⁴ In any event, a sex change is more than gender affirming surgery. He described impediments to undergo gender affirming surgery in Australia, but at no point did he abandon his claim to live as a transgender man.
7. The 2019 Report provides context for the plaintiff’s response to the delegate. It confirms that he was correct: gender-affirming surgery of the kind he was seeking could not be accessed in Malaysia. The 2019 Report makes clear that such procedures are not merely *unavailable* in Malaysia; they are *not allowed*.⁵ Without a sex change, it would be illegal for the plaintiff to have sex with women. The 2019 Report states that “Adult same sex acts are illegal regardless of age and consent” [3.130].
8. The Malaysian government’s prohibition on gender-affirming surgery is not an isolated matter, but part of broader social, religious, and governmental hostility towards the lesbian, gay, bisexual, transgender, and intersex (**LGBTI**) community in general,⁶ and transgender people specifically.⁷ Such hostility manifests in restrictions on transgender people having their gender identity recognised,⁸ the maintenance of state-run “re-education programs for

¹ The Act, s 36(2A)(e).

² See Exhibited MES-1 of the affidavit of Michelle Stone made on 2 February 2025 at pp 11, 13, 14, 15 and 19.

³ *Ibid*, 15.

⁴ *Ibid*, 19.

⁵ See the 2019 Report at [3.130], appearing at Exhibit CKC-2, p 77 of the CKC Affidavit.

⁶ *Ibid*, at [3.131], p 77.

⁷ *Ibid*, at [3.138]-[3.139], p 79.

⁸ *Ibid*, at [3.130], p 77.

LGBTI individuals”,⁹ and restrictions on online activity.¹⁰ The 2019 Report records that many LGBTI persons hide their identities to avoid harassment,¹¹ and that the “increased visibility” of transgender individuals makes them “particularly vulnerable” to action which includes physical harassment, sexual violence, and imprisonment.¹² Numerous state based syariah laws prohibit same sex relations and non-normative gender expression.¹³ It is not only that gender affirming surgery is not allowed, the National Registration Department does not generally allow transgender persons to change their name or sex marker.¹⁴

‘Serious’ or ‘significant’ harm

9. There is ample reason to conclude, based on the 2019 Report, that the inaccessibility of gender-affirming surgery in Malaysia is capable of amounting to ‘serious harm’ or alternatively ‘significant harm’ for those who seek such care. Denial of gender affirming surgery in Malaysia is part of a systemic denial of a person’s gender self-identity. Transgender persons seeking to openly express and embody their gender identity face significant barriers in having their gender identity recognised,¹⁵ and risk being subjected to a re-education program,¹⁶ akin to conversion therapy.
10. Compounding that harm, the plaintiff’s difficulty is that he wishes to change sexual preference. Without a sex change, he is a lesbian. The persecution of lesbians in Malaysia clearly arises to serious harm on the country information in the 2019 Report.¹⁷ Such persecution meets the statutory thresholds for harm that is ‘serious’ or ‘significant’. The plaintiff left Malaysia and came to Australia to access gender-affirming surgery and realise his dream of living as a man with a sexual preference for women. The means by which he seeks to express gender identity and exercise sexual preference is prohibited in Malaysia.
11. The plaintiff cannot express his gender identity by undergoing gender-affirming surgery if returned to Malaysia. Should he attempt to do so, he risks arrest, harassment, and discrimination. Without a sex change he faces persecution based of sexual preference. The only way to safely avoid such consequences would be to forgo his aspiration to receive those surgeries and not exercise his sexual attraction to women. The High Court in *Appellant S395/2002* addressed the fact it is erroneous not to consider whether the person would only

⁹ Ibid, at [3.135]-[3.136], p 78.

¹⁰ Ibid, at [3.138], p 79.

¹¹ Ibid.

¹² Ibid, at [3.139], p 79.

¹³ Ibid at [3.130], p77.

¹⁴ Ibid.

¹⁵ Ibid, at [3.130], p 77.

¹⁶ Ibid, at [3.135]-[3.136], p 78, akin to conversion therapy.

¹⁷ Ibid, at [3.310] - 3.141].

be safe by living discretely.¹⁸ Should he abandon his aspirations, he may be spared some of the negative consequences that come with embodying and expressing his gender identity in Malaysia. That would not mean, however, that he would not suffer ‘serious harm’ in the manner contemplated by s 5J of the Act. Section 5J(3)(c)(vi) provides that while it may be open in some cases for a person to modify their behaviour and thus avoid persecution, they are not expected to “alter [their] sexual orientation or gender identity or conceal [their] true sexual orientation [or] gender identity.”¹⁹ Further, as McHugh and Kirby JJ noted in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*, ‘serious harm’ lies as much in the threat of persecution as it does in the carrying out of persecution.²⁰

12. If the plaintiff is removed to Malaysia, he risks persecution should he attempt to live as a transgender man who wishes to undergo gender-affirming surgery and as someone with a sexual preference for women. It is a matter capable of amounting to ‘serious harm’ and, as a result, it is possible that he could meet the criterion in s 36(2)(a) of the Act.
13. For the same reasons, the Applicant is exposed to the risk of degrading treatment. The 2019 Report is replete with examples of the degrading treatment that transgender persons have experienced in Malaysia.²¹ The denial of gender-affirming surgery, in and of itself, amounts to degrading treatment. As such, there is reason to conclude on review that the plaintiff could satisfy the criterion in s 36(2)(aa) of the Act.
14. Whether or not the plaintiff is found to satisfy either criterion is a matter to be determined when the application is heard afresh according to law. It is not a matter that requires determination within the boundaries of this application for a constitutional or other writ. For present purposes, it suffices to say that the matters raised by the plaintiff in the interview with the delegate, to which grounds 1 and 2 of the application to this Court relate, are matters which could ground the criteria set out in ss 36(2)(a) and (aa) of the Act.

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¹⁸ (2003) 216 CLR 473 at [35]. See recent case law in *AKA24 v Minister for Immigration and Multicultural Affairs*.

¹⁹ Nor are they expected to modify their behaviour in any way which conflicts with a fundamental characteristics of their identity or conscience (s 5J(3)(a)) or which conceals an innate or immutable characteristic (s 5J(3)(b)).

²⁰ Above n 17, [43].

²¹ See, for example, the 2019 Report at [3.138]-[3.139], appearing at Exhibit CKC-2, p 79 of the CKC Affidavit.