

1303281 [2013] RRTA 737 (4 November 2013)

DECISION RECORD

RRT CASE NUMBER: 1303281
DIAC REFERENCE(S): CLF2012/215798
COUNTRY OF REFERENCE: Bangladesh
TRIBUNAL MEMBER: Rowena Irish
DATE: 4 November 2013
PLACE OF DECISION: Sydney
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) 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 applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

CLAIMS AND EVIDENCE

2. The applicant's claims are briefly set out in his application form. He states that he was attacked (resulting in hospitalisation) and kidnapped by the Awami League as a result of his involvement with the BNP. He claims that because of he and his family's popularity the Awami League could not establish themselves in his area. He left Bangladesh to avoid police and RAB harassment as they may add his name to criminal cases, put him in detention or kill him in crossfire. He also fears that the Awami League may attack or kidnap him again.
3. The application form (completed without assistance) states that the applicant was born on [date deleted] in Comilla, Bangladesh. He speaks, reads and writes Bengali and English. He claims to be a citizen of Bangladesh. He has previously travelled to [another country] in 2010 and [a different country] in 2011. He was a student until July 2012 and lists his occupation as "politics", stating that he was a member of the BNP from March 2012 to August 2012.
4. He arrived in Australia [in] August 2012. The delegate's decision (attached to the application for review) states that he travelled to Australia with his father who subsequently returned to Bangladesh. The applicant applied to the Department of Immigration for the protection visa [in] October 2012. The applicant was interviewed by the delegate [in] December 2012. The Tribunal has listened to a recording of that interview and refers to it, where relevant, below. The delegate refused to grant the visa [in] February 2013.
5. In support of his application the applicant provided:
 - A letter and translation from his father, [name deleted] dated [in] November 2012 stating:

I and my son went to Australia but I came back keeping him there for his safety of life. He got associated with politics, right from passing his Higher Secondary Education. Family wise, we are followers of Bangladesh Nationalist Party and thereby got associated with Politics. With that reference, my son Joined Politics. But due to his such association with Politics, we became the victim of acute sufferings in our day to day life. Activists belonging to Awami League him subject to physical torture. But he did not retreat from Politics.

At last, Awami League activists kidnapped him. In lieu of money, I got him released from their dead clutch. From that time I promised not to keep him in Bangladesh and it is not at all safe for him here. Finding no other alternative I rescued my said son in terms of huge money and took to Australia and kept him there.

Aster Kidnapping and after his rescue the police authority hassed him. Interrogated him calling him in the police Station. Also threatened to entangle him in different cases. Because I blamed Awami League for such kidnap, and for getting relief from fear and torture. For such reason, I am compelled to keep my son in Australia.

- A letter from [Mr A] of [the] committee, BNP dated [in] November 2012 stating that the applicant is actively involved in the organisation, his father contributes financially to the BNP, the applicant was attacked and kidnapped by the Awami League.
 - Three photographs of the applicant in BNP demonstrations.
6. [In] September 2013 the Tribunal wrote to the applicant advising that it had considered all the material before it relating to his application but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing [in] October 2013. The applicant was advised that if he did not attend the hearing and a postponement was not granted, the Tribunal may make a decision on his case without further notice. No response was received. The Australia Post “Track your item” website shows that the hearing invitation, sent by registered mail was delivered [in] September 2013. The applicant did not appear before the Tribunal on the day and at the time and place at which he was scheduled to appear. In these circumstances, and pursuant to s.426A of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before it.

FINDINGS AND REASONS

7. The law upon which the findings below are based is set out in Attachment 1.
8. On the basis of the applicant’s Bangladesh passport, a copy of which was provided with his application, the Tribunal finds that the applicant is a citizen of Bangladesh. There is nothing in the evidence before the Tribunal to suggest that the applicant has a right to enter and reside in any country other than Bangladesh. Therefore the Tribunal finds that the applicant is not excluded from Australia’s protection by subsection 36(3) of the Act. As the Tribunal has found that the applicant is a national of Bangladesh, the Tribunal also finds that Bangladesh is the applicant’s “receiving country” for the purposes of s.36(2)(aa).
9. The applicant did not attend the hearing and has not provided any further documents or evidence in support of his claims. This leaves the Tribunal with claims that are untested by the Tribunal and stated in general terms.
10. The applicant claims to have been attacked, kidnapped and threatened in Bangladesh as a result of his involvement with the BNP. However he does not appear to have a political profile that would warrant such targeting. At the time he left Bangladesh he was [age deleted] and had only completed his schooling in July [year]. He departed in August 2012. Had he attended the hearing the Tribunal would have discussed with him how he managed to study at school while also engaging in political activities and why he had such a prominent role at such a young age. Furthermore, in the application form the applicant states that he was a member of the BNP only from March to August 2012. Had he attended the hearing the Tribunal would have discussed with him how he achieved such a high profile in such a short amount of time.
11. The applicant claims that his father is involved with the BNP and is an important financial contributor. Had he attended the hearing the Tribunal would have discussed with the applicant when his father became involved with the BNP, what his role was in the BNP, what difficulties he had in Bangladesh as a result of his support for the BNP. The Tribunal would have discussed why it was safe for his father to return to Bangladesh despite his support of the BNP but it was not safe for the applicant to return.

12. In the application form the applicant states that there are criminal charges pending against him and the police were looking for him. In his written claims and the letter from his father it refers to the possibility of his name being added to criminal charges. Had he attended the hearing the Tribunal would have discussed with him why the police were looking for him, how he became aware that the police were looking for him, why the police were unable to find him and whether there were any criminal charges pending against him (as he stated at the Departmental interview that there were not). Without further evidence from the applicant about when and why the police were looking for him the Tribunal is not satisfied that they were.
13. The applicant claims to have been attacked by the Awami League in Bangladesh. He stated at the Departmental interview that the attack occurred while he was on his way home from a BNP meeting at 9pm. He stated that he was stabbed and showed a scar which he claimed was from a knife injury. He did not refer to having been hospitalised but in his written claims says that he was hospitalised as a result of an attack by the Awami League. Had he attended the hearing the Tribunal would have sought further information from the applicant about whether, when and why he was hospitalised, why his father was not with him in light of his claimed involvement with the BNP also and whether he is able to provide any supporting evidence from the hospital where he was admitted about his injuries. In the absence of further evidence from the applicant about the circumstances of his claimed attack and hospitalisation the Tribunal is not satisfied that the attack occurred.
14. The applicant claims to have been kidnapped by the Awami League in Bangladesh. Had the applicant attended the hearing the Tribunal would have discussed with him the relevant dates in relation to this kidnapping. At the Departmental interview he initially stated that he was kidnapped [in] August 2012 but later that it was [later in] August 2012. He stated that he was released [a few days later in] August 2012 but that his father only paid the ransom [a week later in] August 2012. The Tribunal would have discussed with the applicant why he was released a week before his father paid the ransom. The applicant stated at the Departmental interview that after he was kidnapped he fell asleep and only awoke the next morning. Had the applicant attended the hearing the Tribunal would have discussed with him when and why he fell asleep in such a stressful situation. The applicant stated at the Departmental interview that the shopping centre where he was kidnapped was a 10-15 minute walk from his home and that he was waiting for a rickshaw home at the time of his abduction. Had he attended the hearing the Tribunal would have discussed with him why he was waiting for a rickshaw if it was such a short walk home. In the absence of further evidence from the applicant about the circumstances of his claimed kidnapping the Tribunal is not satisfied that it occurred.
15. The applicant has provided three photographs in support of his claims. The Tribunal has serious concerns in relation to the quality of those photographs. It appears to the Tribunal that the photographs have been edited and the applicant's face superimposed in them. His face is significantly more focused than the faces of those around him and in one of the photographs a hand (presumably intended to be the applicant's hand) appears not to be connected to his body. Had the applicant attended the hearing the Tribunal would have discussed these concerns with him.
16. The applicant has also provided two letters of support. One is from his father and the other from [Mr A] of [the] Committee. The letter from his father refers to his father "[f]inding no other alternative", having to send the applicant to Australia. However it does not state what alternatives were attempted and why they failed. The application form states that the applicant lived at the same address in Bangladesh until his departure to Australia which

suggests that the applicant was not in hiding. Had the applicant attended the hearing the Tribunal would have discussed with him why he could not relocate to another part of Bangladesh away from the local Awami League cadres who he claims to have problems with.

17. The letter from [Mr A] states that the applicant “played a vital role for BNP”. This does not appear to be consistent with the applicant’s age ([age deleted] at the time of departure from Bangladesh), the length of time that he states he was a member of the BNP (from March to August 2012) or the applicant’s involvement with the BNP (as he does not claim to hold any position in the BNP and merely attends protests and meetings). Furthermore, the applicant stated at the Departmental interview that the letters had been send to him by email and the photographs posted to him. Had he attended the hearing the Tribunal would have discussed with him why the originals of the letters were not sent to him by post together with the photographs as evidence for his application.
18. The information available to the Tribunal indicates that forged or fraudulently obtained documents are readily available in Bangladesh¹ which raises doubts in the Tribunal’s mind about the genuineness of the documents provided by the applicant. In light of this and the concerns discussed above the Tribunal places little weight on the letters and photographs provided the applicant.
19. In light of the above concerns the Tribunal is not satisfied that the applicant’s claims are credible. It is not satisfied that the applicant was involved in BNP in Bangladesh or that he was attacked, kidnapped or threatened in Bangladesh.
20. As the Tribunal finds the applicant has not provided sufficient evidence to satisfy the Tribunal of his claims, it is not satisfied the applicant has a well-founded fear of persecution for a Convention reason should he return to Bangladesh. 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).
21. 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). As the Tribunal has found that the applicant has not provided sufficient evidence to satisfy the Tribunal of his claims it is not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of him being removed from Australia to a receiving country, there is a real risk that he will suffer significant harm. Therefore, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
22. 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).

¹ see Research Directorate, Immigration and Refugee Board of Canada, ‘Bangladesh: reports of fraudulent documents’, 20 September 2010, BGD103532.E; Research Directorate, Immigration and Refugee Board of Canada, ‘Bangladesh: Prevalence of fraudulent, forged or fake documents and genuine documents obtained by fraudulent means ...’, 8 August 2005, BGD100388.E; UK Home Office, *Country of Origin Information Report - Bangladesh*, 11 August 2009, paragraph 35.02; Australian Department of Foreign Affairs and Trade (DFAT) cable DA19732, dated 26 July 1988, CX2690

DECISION

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

Rowena Irish
Member

ATTACHMENT 1 - RELEVANT LAW

1. 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.

Refugee criterion

2. 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).
3. 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.
4. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the Regulations to a particular person.
5. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
6. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
7. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
8. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the

motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

9. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
10. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
11. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

12. 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').
13. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
14. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

15. 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.