

1314887 (Refugee) [2016] AATA 3766 (23 April 2016)

DECISION RECORD

RRT CASE NUMBER:	1314887
COUNTRY OF REFERENCE:	Sri Lanka
TRIBUNAL MEMBER:	George Haddad
DATE:	23 April 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 23 April 2016 at 11:07am

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 applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Sri Lanka, applied for the visa [in] December 2012 and the delegate refused to grant the visa [in] October 2013.
3. The applicant appeared before the Tribunal on 25 February 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Sinhala and English languages.
4. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing by telephone.
5. The issues in the present case are whether the applicant has a well-founded fear of persecution for one or more of the five reasons contained in the Refugee Convention; and if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm.
6. For the following reasons the Tribunal has concluded that the decision of the delegate should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

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

7. The applicant claims to be of Sinhalese ethnicity and Catholic. He was born on [date]; He is [age] years old. He is single and has no children. He provided his last address in Sri Lanka to be in [Town 1], Negombo, Gampaha District (Western Province) prior to departing Australia.
8. In assessing the applicant's claims, I have had regard to the Department's file relating to the protection visa application, the primary decision record, a copy of which the applicant provided to the Tribunal, the written submissions made prior to and after the hearing from the applicant's representative and country information referred to and which I discussed during the hearing and that referred to by the representative in submissions; as well as country reports from the Department of Foreign Affairs and Trade (DFAT) on Sri Lanka and the Procedures Advice Manual 3 (PAM 3) published by the minister's Department.

Country of reference for assessment of claims

9. The Tribunal finds the applicant is a national of Sri Lanka. He has provided copies of his birth Certificate, and Sri Lankan ID. He is of Sinhalese ethnicity and Catholic religion, born in [Negombo], Western Province, There is no evidence to suggest that he is a national of any other country and he made no claim to be a national of any other country. The Tribunal accepts the applicant's claims should be assessed against Sri Lanka for the purposes of the Convention in s.36(2)(a) and as the receiving country for the purposes of the complementary protection obligations in s.36(2)(aa). In making the below findings, the Tribunal has

considered the applicant's area of [Town 1], Negombo, the place he resided prior to departing Sri Lanka (and where his family continues to reside), to be his home region.

The applicant's claims

10. The applicant set out his claims in a written statement provided with his protection visa application which may be summarised as follows:

I am a Sri Lankan citizen by birth and have no other citizenship. I am Sinhalese, Catholic and single.

My parents [and siblings] remain in Sri Lanka.

I was born in Negombo, Gampaha District, Western Province, Sri Lanka.

My father was a member of the UNP prior to 2009. He attended meetings and rallies against the Sri Lankan government. He opposed government policy which was used against the local population and its effect on local Sinhalese fishermen in our local area of Negombo.

The government raised the price of fuel used in fishing boats.

He attended rallies opposing these measures and confronted hostile reaction from the police and government supporters. My father and brother suffered an array of abuse and beatings from the police at this time.

We had problems with government supports at the local fish market trying to sell our catch at lower prices; my father was confronted by government supporters and beaten up.

Due to my father's political position and questioning of government policy that he and I suffered the loss of support and protection from the police and the State.

A further issue is that the plans to build a [construction] in the vicinity of the fish market which will impact on our ability to subsist. It is impossible to consider relocating to other areas where other fisherman are established as it would result in further problems for our family.

This situation reached boiling point in [2012] when the whole village rose up against the proposal to build the [construction]. The protest continued for a number of days and the military was called in to control the crowd. The military told all present that no member or supporter of the UNP could use the fish markets to sell their fish; Only government supporters are permitted to use the markets.

My father did not follow this directive and continued to sell fish at the markets. The police confiscated all the fish from those like my father. The police compiled lists of all who did not observe the directive and required them to attend the police station for interviews and they were subsequently fined.

This impacted my ability to work and deprived me of my right to subsist in a safe and harmonious environment. This was obviously due to my father's association with the UNP and opposition to the regime.

My father assisted in my effort to depart Sri Lanka by boat and paid LKR[amount] and [in] June 2012 I arrived at [location] and [in] June 2012 I arrived [at location] and was transferred to [a detention centre] and finally to [another detention centre] in [state].

In Sri Lanka I fear the police, CID, EPDP and SLA will arrest and kill me on suspicion of my past in relation to the abovementioned incident.

I have heard that I will be imprisoned and of possible threats to my life by those groups if I were to return to Sri Lanka. The Government in Sri Lanka comprises the EPDP, SLA and INT who are continue to seek me and are against my family.

The primary decision record

11. The applicant provided a copy of the primary decision record with his application for review.
12. The delegate records that at the protection visa interview held at the Department [in] September 2013, the applicant repeated his the claims he made in the application for the visa and stated that his father and brother continue to work as fishermen and sell their fish directly to buyers. He said that they method they use to sell their fish is not legal. He also stated that his family has moved to a different address around one kilometre from their previous address. He stated to the delegate that if had worked [in occupation] as part of the course he studied after completing school. If he were to work in this job, he would have to update his skills.
13. In short the delegate, among other things, accepted that the applicant worked as a fisherman and attended rallies and protests; had experienced economic difficulties and that his father was questioned and fined by the police but noted that the applicant's father was not beaten or detained and that his father and brother have continued to sell fish they catch. He accepted that the applicant's father was a member of the UNP prior to 2009 and was harmed during a protest about increasing oil prices. He accepted that the family joined in a mass protest against a major [development] and the impact it has had on the family's ability to operate at the fish markets. The delegate refused the application [in] October 2013.

The review

14. The applicant's representative provided a written submission to the Tribunal dated 19 February 2015. The submission discusses many of the delegate's findings and questions the basis on which conclusions were made in relation to the applicant's claims. It contends the findings and provides further explanation. It also argues that the applicant's father continues to be a member of the UNP and the applicant began to support the UNP in 2009.
15. The submission argues that the applicant did not provide an answer from the delegate as to when the oil price increase protest occurred because he was certain of the date but now states that it occurred in approximately [2012]. It adds that the applicant was not harmed during the two protests he attended but that his father was assaulted and his brother received minor injuries.
16. The submission further argues that the mass protest against the [construction] was politically motivated because [a minister] was responsible for the [construction] which required partial demolition of the fish markets to make room for the road to the [construction] with shops belonging to UNP supporters being demolished but those belonging to government supporters remained standing. The applicant suggests that the destruction of the fish market

was a political gesture intended to harm the fishermen because they supported the UNP and the police were unwilling to assist the fishermen after they complained.

17. The submission further submits on the applicant's instructions that his family moved to [Town 1] after he came to Australia because government supporters threatened his father because he had difficulty selling his fish. His father's business in [Town 1] is too small for the applicant to join if he were to return and if he were to return he would be forced to attempt to sell fish at the market and fears that the police would not protect him from government supporters especially that he has left Sri Lanka illegally.
18. The submission makes further arguments in response to the delegate's findings and concludes by claiming that the applicant claims protection on the basis of:
 - a. Political opinion (support for the UNP)
 - b. Membership of a particular social group (failed asylum seekers returned to Sri Lanka)
19. Arguments are presented on the above two grounds with reference to reports, country information, the UK Upper Tribunal decision¹, and concludes that the applicant satisfies s.36(2)(a) and alternatively satisfies s.36(2)(aa).

The tribunal hearing

20. The applicant confirmed his personal details. He stated that he completed [school] education and a further 2 years in [a course]. He worked as fisherman and [occupation] in Sri Lanka. His father is a fisherman currently in [Town 1]; his brother is aged [age] and works with his father; his [other sibling] is [age] and studying; and his mother is a home-maker. He stated that his father arranged his passage to Australia at the cost of [amount] Lakhs; he prepaid [amount] Lakh and will pay the remaining [amount] Lakhs.
21. The applicant confirmed that he claims protection on the grounds of political opinion and membership of a particular social group returning as a 'failed asylum seeker'.

Political opinion

22. The applicant stated that his father's political opinion is UNP and the applicant attended political rallies with his father. Asked when, the applicant said that once in 2009 when the price of oil was raised by the government; and another time in 2012 when his father had problems with the government regarding his business.

2009 protest

23. Asked who organised the rally in 2009 and who attended, the applicant said the UNP and other political parties organised the rally and UNP supporters – his father and most of the village attended, he added that around [number] – [number] people attended. The protest was in relation to the government raising the price of fuel. At first he said there were no government supporters among the thousands of protesters because, he said, government supporters do not object to anything the government does. Then he stated that he cannot tell if there were government supporters among the protesters.

¹ *GJ v Secretary of State for the Home Department (post civil war: returnees) Sri Lanka CG* [2013] UKUT 319 (IAC).

24. I asked the applicant why he believes he would be singled out from a crowd of thousands; he said his father and brother were affected by tear gas. They did not know how to protect the applicant until they found a boat to take him to Australia.
25. He said that he too was involved with his father's activities, government supporters harassed his father. Asked what the activities were; the applicant said his father faced obstructions from government supporters. Since 2009 they gave him trouble and did not allow him to sell his fish. In 2009 his father was bashed; and in 2012 he was not allowed to conduct his business. Because the applicant was working with his father, his father worried about him and sent him to Australia.
26. I asked why his father was bashed in 2009, the applicant replied that his father was selling fish for a lower price and was bashed by owners of the fish market in Negombo.

2012 incident relating to his father not able to do business

27. The applicant stated that his father 'was not allowed to do business'. When his father went to the police, they became angry. His father was selling fish on the main road; the government did not want people to sell fish on the main road because they wanted to build a [construction]. He said the fish market was demolished and had to move somewhere else. Asked if all the stalls were demolished, the applicant then said that only the stalls on the main road were demolished to widen the road for the [project]. What remains of the fish market is managed by the government.
28. The applicant said the whole village was opposed to and protested against the [project].
29. I asked the applicant if there had been any other incidents, he said there had not.
30. I asked the applicant why he thinks he would be singled out for mistreatment given he is one person in the whole village that was protesting against the [project]. He said he cannot say that he would be singled out but he does not know what will happen to him.
31. I indicated that on the basis of everything he has stated and claimed, nothing appears to give rise to any interest in him by the police, CID, the SLA or any other authority he has named.
32. He responded by stating that he does not know what will happen to him. His father decided that it was not safe; Sri Lanka, unlike Australia, is not free.

Failed asylum seeker and illegal departure from Sri Lanka

33. The applicant stated that he departed Sri Lanka illegally and according to Sri Lankan law he will be punished and imprisoned for long periods of time; prison life would be horrible and 'they might try and get information from him'.
34. I explained to the applicant the advice from the Australian Department of Foreign Affairs and Trade (DFAT) report on Sri Lanka which provides how returnees are treated on their return to Sri Lanka after leaving illegally². I indicated that the advice indicates that he may be questioned and may have to wait for several hours due to staffing constraints but once his identity is confirmed and he is not of interest to the authorities because of any previous crime or other interests he will be charged under departure laws which in cases such as his would almost certainly result in a fine. That is because he has indicated that he has not committed any crime or has any charges pending in Sri Lanka and on all the evidence he

² Department of Foreign Affairs and Trade (DFAT) Country Report Sri Lanka – 16 February 2015

has given me, nothing suggests that it amounts to raising an interest by the authorities. I invited him to comment, He said he is aware of the process I described but has also heard that some returnees are held in prison for a long time. I agreed that there are such cases which according to DFAT advice, it includes persons who were involved in facilitating the people smuggling operation and not passengers.

35. The applicant again stated that he fears returning.
36. I again asked him if his fear is for any reason other than the claims he has made. He said:
I do not trust the police
I do not trust the government
I don't know what will happen to me because of the incidents I described.
37. I asked the applicant if he was aware of the recent change of government in Sri Lanka and that the Sirisena cabinet includes several UNP members. He said he is aware. But that he will not return to Sri Lanka. He took this decision before he departed that he will not return.
38. I invited the representative to make oral submissions and asked if she was satisfied that all claims and issues have been addressed. She replied that the issues and claims have been addressed and she did not have anything to add.
39. The applicant does not claim to be a member of a political party. He claims to have supported the UNP from 2009 and to have participated in political activities with his father. He clarified that the political activities which he claims were the protests he referred to. I note that in his written submission to the Tribunal in contending or discussing the primary decision record, he provided that when interviewed by the delegate he was unable to recall when the protest relating to oil price increases occurred. But in the submission to the Tribunal he was able to recall that it was approximately [2012]. At the hearing he recalled it was in 2009. Be it 2009 or 2012, I take no negative inference from the inconsistency. I accept that the protest was against a decision by the Sri Lankan government to increase the price of fuel which affected the fishermen. It was attended, according to the applicant, by [number]-[number] people or almost the entire village. The reason for the protest was that it impacted the fishermen's economic circumstances. I accept also that the protest against the [development] in 2012 included all those that were affected by the development by disrupting or changing the place and way to sell their catch. I accept too that local officials may have favoured the then Rajapaksa government supporters in the way they allocated places to sell fish and did not help those identified as not supportive of the political party then in government. I accept that the applicant would have been attributed a political opinion as a UNP supporter given his participation in the protests and his father's membership of the UNP.
40. I accept too that the applicant's father was bashed at the market in 2009 for selling his fish at a lower price. I accept that his father was injured during the protest and his brother received minor injuries. Given the applicant stated that tear gas was used by the authorities in response to the protests it suggests reasonably that there was some physical violence involved during the protest. I accept too that his father was fined for selling fish on the main road; it appears to have been the application of a regulation whether applied justly or not. I do not accept that any of this rises to the level of serious or significant harm, in particular to the applicant. The applicant himself does not claim to have suffered any injury. He does not claim to have been detained or questioned in any way to suggest that he was of any particular ongoing interest to the authorities. I indicated to the applicant during the hearing that I was finding it difficult to identify anything in his evidence that amounts to serious or significant harm or any harm.

41. I have also considered the representative's written submission and the country information referred to from sources including Human Rights Watch, Freedom House, the International Crisis Group and newspaper reports. The submission starts by discussing the delegate's decision record and credibility issues that arose for the delegate. The country information refers to conduct by the Rajapaksa government against critics and that despite the change of government in 2015, the behaviour of the SLFP is evidence of intolerance of dissent. It cites reports of election related violence in January 2015. I have considered the submission and reference to country information. I have also discussed the reports of significant change to the political circumstances since the election of the Sirisena government which includes several members of cabinet from the UNP. I do not accept that the applicant is a person with a profile the submission describes and I do not accept therefore the argument that the applicant faces a real chance of serious or significant harm on the basis of actual or imputed political opinion now or in the reasonably foreseeable future.
42. I have considered too the applicant's reference to his fear of not being able to subsist if he were to return to Sri Lanka. He said that his father's business is too small to accommodate him. I do not accept that relying on his father's business is the applicant's only option. He said he has worked as a fisherman and has studied a [course] which qualified him to [do an occupation]; and he indicated that he has worked in this field. I note that the applicant has stated that to work [in occupation], he would need to update his skills. I accept that he would need to do so; he does not claim that he would be unable to update his skills. I do not accept therefore that the applicant would not be able to subsist if he were to return to Sri Lanka.
43. Having considered the applicant's claims individually and cumulatively relating to past activities, I do not accept the applicant faces a real chance of any harm now or in the reasonably foreseeable future for reasons of actual or imputed political opinion.

Illegal departure/failed asylum seeker

44. I have also considered the applicant's fear of returning to Sri Lanka as a failed asylum seeker and because he departed Sri Lanka illegally.
45. I discussed these issues with the applicant during the hearing and informed him of the information available to the Tribunal including the report from DFAT which provides as follows:

Treatment of Returnees

5.23 Returnees are generally considered to have committed an offence under the I&E Act if they depart Sri Lanka irregularly by boat. Where a returnee is travelling voluntarily on their own passport on a commercial flight they may not come to the attention of local authorities if they departed Sri Lanka legally through an official port on the same passport, because they have not committed any offence under the I&E Act.

Exit and Entry Procedures

5.24 Upon arrival in Sri Lanka, involuntary returnees, including those on charter flights from Australia, are processed by the Department of Immigration and Emigration (DoIE), the State Intelligence Service (SIS) and Airport CID. Officers of the Australian Department of Immigration and Border Protection (DIBP) based in Colombo endeavour to meet all commercial flights and charter flights with involuntary returnees from Australia on arrival. DIBP has observed that processing arrivals typically takes several hours, primarily due to the manual nature of the interview process and staffing constraints at the

airport. Voluntary returns eligible for an Australian Government Assisted Voluntary Return package are usually met by the International Organization for Migration. Other voluntary returnees are usually met by DIBP staff based at the Australian High Commission in Colombo.

5.25 During the processing of returnees, DoIE officers check travel document and identity information against the immigration database. SIS checks the returnee against intelligence databases. Airport CID verifies a person's identity to then determine whether the person has any outstanding criminal matters.

5.26 For returnees travelling on temporary travel documents, police undertake an investigative process to confirm the person's identity, which would address whether someone was trying to conceal their identity due to a criminal or terrorist background, or trying to avoid, among other things, court orders or arrest warrants. This often involves interviewing the returning passenger, contacting the person's claimed home suburb or town police, contacting the person's claimed neighbours and family and checking criminal and court records. DFAT assesses that Sri Lankan returnees are treated according to these standard procedures, regardless of their ethnicity and religion—Tamil, Sinhalese and Muslim returnees are treated the same way on arrival in Sri Lanka. DFAT further assesses that detainees are not subject to mistreatment during their processing at the airport.

Offences under the Immigrants and Emigrants Act

5.27 Most Sri Lankan returnees from Australia are questioned by police on return and, where an illegal departure from Sri Lanka is suspected, are charged under the I&E Act. DFAT understands that in most cases, these individuals have been arrested by the police at Colombo international airport. As part of this process, most returnees will have their fingerprints taken and be photographed. They are transported by police to the Magistrates Court in Negombo at the first available opportunity after investigations are completed, when custody and responsibility for the individual shifts to the courts or prison services. The Court makes a determination as to the next steps for each individual. Those arrested can remain in police custody at the CID Airport Office for up to 24 hours. Should a magistrate not be available before this time—for example, because of a weekend or public holiday—those charged are held at the nearby Negombo Prison.

The Magistrates Court in Colombo typically levies fines of around 5,000 Sri Lankan Rupees (around AUD 40) for persons attempting to depart Sri Lanka irregularly on boats. However, in Negombo, the magistrate, who handles a large number of these cases, typically levies fines of around 50,000 Sri Lankan Rupees (around AUD 400) to act as a deterrent. In most cases, returnees have been granted bail on personal recognisance immediately by the magistrate, with the requirement for a family member to act as guarantor. Sometimes returnees then need to wait until a family member comes to court to collect them.

46. I accept that on returning to Sri Lanka the applicant will face questioning at the airport about his activities during the time he has been outside of Sri Lanka. I accept that he will be charged and may be convicted under Sri Lanka's departure laws. Having regard to the DFAT Country Report on Sri Lanka to which I referred above and as I have found the applicant to have a profile that is not of any interest to the authorities for any reason, I do not accept that

there is a real chance that the applicant will face serious harm at the airport on the basis of illegal departure or returning as a failed asylum seeker now or in the reasonably foreseeable future.

47. The information from DFAT is that returnees have been granted bail on personal surety immediately by magistrates. I note the applicant has family in Negombo who would be able to come and collect him from court. While I accept reports indicate that prison conditions in Sri Lanka are generally poor but as noted earlier, the DFAT report indicates that all Sri Lankans are treated the same way regardless of religion or ethnicity and there is no evidence or information to indicate mistreatment of returnees held on remand. The Tribunal finds that the applicant will not be treated differently because of being convicted of breaches of departure laws for any Convention reason.
48. I find that any short term detention or fine does not amount to persecution for a Convention reason because it is the enforcement of a generally applicable law which is not applied with discriminatory intent or effect; nor are they applied selectively or in a discriminatory manner for a Convention reason or non-convention reason.
49. I accept that on his return to Negombo, he will be noted for his absence and return. He is likely to be questioned by the Sri Lankan authorities. Given the findings above that the applicant is of no interest to the authorities for any reason, I do not accept that the applicant will face a real chance of serious harm, now or in the reasonably foreseeable future in his place of origin because he is a failed asylum seeker.
50. I have considered whether the applicant will face a real chance of serious harm on the basis of his claims separately and cumulatively – if the effect of each claim separately or the combined characteristics of being imputed with political opinion in support of the UNP, as a member of a particular social group ‘failed asylum seekers’ or for having departed illegally and returning involuntarily as a failed asylum seeker from Australia would mean that there is a real chance of facing serious harm. I have also noted that he states that he is Sinhalese and Catholic but does not make any claims on this basis; having regard to available country information I find that he does not face any serious or significant harm on these bases. Given the above findings I do not accept that there is a real chance the applicant will face serious harm for reasons of political opinion, or any other Convention reason if he were to return to Sri Lanka now or in the foreseeable future.
51. I have accepted that the applicant will be questioned on arrival at the airport and in his home area of Negombo; that he will be charged under Sri Lanka’s departure laws and would be bailed; to the extent that there is a risk the applicant may suffer harm as a result of this process; s.36(2B)(c) qualifies that it is not taken to be a real risk as it is a risk faced by the population generally and not by the applicant personally. The reasoning in *SZSPT v MIBP*³, suggests that the ‘faced personally’ element of the qualification in s.36(2B)(c) requires the individual to face a risk of differential treatment. On the basis of my findings that the applicant is of no interest to the authorities in Sri Lanka, I am satisfied that the risk he is likely to face is one that would be faced by the population generally.
52. I accepted that the applicant will be held on remand for a short period in relation to the charges and conviction which could lead to a fine but as he is of no interest to the authorities, the short period on remand (noting the DFAT report) and the fine, does not rise to the level of serious harm.

³ [2014] FCA 1245 (Rares J, 3 November 2014). In this regard, the Court observed that there was no differential treatment as the law was one of general application and was not applied in a discriminatory manner: at [12]-[14].

53. I have found that he will not face a real chance of serious harm if he were to return to Sri Lanka now or in the reasonably foreseeable future. In *MIAC v SZQRB* [2013] FCAFC 33, The Full Court of the Federal Court held that the 'real risk' test imposes the same standard as the 'real chance' test in the assessment of 'well-founded fear'. I have also had regard to the Procedural Advice Manual. As I did not accept the applicant has experienced any harm in the past and I have not accepted the submissions from the applicant's representative as establishing a basis for serious or significant harm; while I have found that he will be charged and convicted under Sri Lanka's departure laws, I do not find the harm to amount to serious harm. Having regard to the definition of significant harm, I do not find the harm I have accepted amounts to significant harm within the meaning of s.36(2A).
54. There is no other basis before me to support that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will 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 subjected to cruel and inhuman treatment or punishment or that he will be subjected to degrading treatment or punishment as defined. Accordingly I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm as that term is defined in s36(2A).
55. 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).
56. 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).
57. 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

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

George Haddad
Senior Member

ATTACHMENT

RELEVANT LAW

59. 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.

Refugee criterion

60. 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).
61. 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:
62. 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.
63. 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.
64. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
65. 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.
66. 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.
67. 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.

68. 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.
69. 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.
70. 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

71. 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').
72. '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.
73. 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

74. 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.