

1502343 (Refugee) [2016] AATA 4053 (6 July 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1502343
COUNTRY OF REFERENCE:	Fiji
MEMBER:	Belinda Mericourt
DATE:	6 July 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 06 July 2016 at 3:32pm

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 Fiji, applied for the visa [in] October 2014 and the delegate refused to grant the visa [in] February 2015.
3. The applicant lodged an application for review of the Department's decision with the Tribunal on 17 February 2015.
4. The applicant appeared before the Tribunal on 5 July 2016 to give evidence and present arguments. The applicant was represented in relation to the review by his registered migration agent.

RELEVANT LAW

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

Refugee criterion

6. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
7. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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 and

include a threat to the person's life or liberty; significant physical harassment of the person; significant physical ill-treatment of the person; significant economic hardship that threatens the person's capacity to subsist; denial of access to basic services, where the denial threatens the person's capacity to subsist; and denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist. 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.

11. 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.
12. 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.
13. 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.
14. 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.
15. 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

16. 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').

17. '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.
18. 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

19. 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.

BACKGROUND

20. The applicant was born in [year] in [Town 1], Fiji and is a citizen of Fiji. He is of Indo-Fijian ethnicity and Hindu religion. His parents and [siblings] reside in Fiji. He is single and has no dependents. He completed high school in [year] and completed a [course] in [year]. He worked as [two occupations] in Fiji between [year] and 2014.
21. The applicant first entered Australia [in] April 2013 as the holder of a [temporary visa]. He departed [in] June 2013 before his visa ceased. He was then granted a [different temporary visa] [in] September 2014 and entered Australia [in] October 2014. He lodged his application for protection [in] October 2014.

CONSIDERATION OF CLAIMS AND EVIDENCE

22. The Tribunal has before it the Department's file relating to the applicant, which includes a certified copy of the applicant's Fijian passport issued [in] 2012 in Fiji, his application for a protection visa, his written statement of claims, the audio recording of his interview by the delegate [in] February 2015 and a copy of the delegate's decision record. The Tribunal has also referred to relevant country information as cited in this decision.

Claims made in the applicant's written application and at the interview with the delegate [in] February 2015

23. In his written claim for protection the applicant claimed that he belongs to a political party – Fiji First and is an active supporter of the party. The applicant stated that he believes he will be "significantly harmed and arbitrarily deprived of his life and subjected to inhuman treatment" if he is forcibly returned to Fiji. He did not specify the reasons that he feared harm or provide any details of past harm he had experienced in Fiji.

24. The Tribunal has listened to the audio recording of the interview with the delegate and is satisfied that the summary in the decision record dated [in] February 2015 is accurate.
25. At the interview the applicant stated that he feared returning to Fiji as he had experienced problems at work due to his Indo-Fijian ethnicity and his Hindu religion. When working [in Occupation 1], indigenous Fijians threatened to harm him if did not pick them up in his [vehicle], he was forced to wait for his [vehicle] while indigenous Fijian [workers] received preferential treatment and when he was working as [Occupation 2] his supervisor (who was an indigenous Fijian) would swear at him and make insults about his religion. He feared going back because he would have to work under the same supervisor at his job.
26. The delegate found that the applicant's claims in his written application were so vague as to not indicate he feared any harm. At the interview the applicant only claimed discrimination at work due to his ethnicity. The delegate was not satisfied that the applicant had a well-founded fear of persecution or that he would suffer serious or significant harm if he were to return to Fiji now or in the foreseeable future.

Claims made at the Tribunal hearing

27. The Tribunal discussed the applicant's current circumstances, background and claims for protection which are summarised as follows.
28. The applicant confirmed that his parents and one [sibling] reside in Fiji. [One sibling] passed away soon after his arrival in Australia. The applicant's [specified relatives] reside in Australia. The applicant is currently living with one of [those relatives] who has been financially supporting him.
29. In Fiji the applicant worked as [Occupation 2] in Suva for about a year before he departed Fiji. Prior to that he worked as [Occupation 1], and prior to that as [an Occupation 2] in [Town 1].
30. The applicant told the Tribunal that all his problems came from discrimination at his workplace. When he was [at a particular workplace] he was the only Indo-Fijian [Occupation 1] and he had to conform to indigenous Fijian [workers'] demands. He told the Tribunal about one incident when he gave some Fijian boys a lift. They were verbally abusive towards him and sexually harassed him. He had been unable to tell the delegate about this incident at his interview as there was a female Indo-Fijian interpreter present and he felt uncomfortable and ashamed.
31. The Tribunal asked the applicant had he suffered physical harm or abuse. He said that sometimes he was pushed and threatened with being hit. He was also discriminated against when it came to [his work as Occupation 1]. He could never do anything about these issues as he was the only Indo-Fijian [Occupation 1] working for the [company]. He eventually left this job because of the discrimination he experienced and because the pay was not as good as he had been led to believe.
32. After he left his [Occupation 1] position the applicant obtained as position of [Occupation 2] in Suva. His supervisor was an indigenous Fijian who discriminated against him. For example, he made him physically [do work] when there was an [equipment] available, he made fun of his religion and falsely accused him of stealing. He did not have problems with his previous [Occupation 2] work in [Town 1], however, he could not return to work there as the company has since closed and there is no [Occupation 2] employment there. This is the reason he moved to Suva and took the [Occupation 1] job.

33. The Tribunal asked the applicant were there any other reasons he feared to return to Fiji. The applicant said maybe because he voted for Fiji First and he was the only Indo-Fijian amongst his colleagues who voted Fiji First. He helped with the campaign and used to have a Fiji First banner in his [vehicle]. He removed it because he had a feeling that the opposition party didn't like the banner. However, no actual threats were made to him.
34. The applicant did not think that he could relocate to another part of Fiji as there was no work available for him. He did not think authorities would provide protection against discrimination in the workplace.

FINDINGS AND REASONS

35. Section 5AAA of the Act makes clear that it is the applicant's responsibility to specify all particulars of a claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish the claim. The Tribunal does not have any responsibility or obligation to specify, or assist the applicant in specifying, any particulars of the applicant's claims. Nor does the Tribunal have any responsibility or obligation to establish, or assist in establishing, the claim.

Requirement that the decision-maker be 'satisfied'

36. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is 'well-founded' or that it is for the reason claimed. Similarly, that an applicant claims to face a real risk of significant harm does not establish that such a risk exists, or that the harm feared amounts to 'significant harm'. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. A decision-maker is not required to make the applicant's case for him or her. It is the responsibility of the applicant to specify all particulars of the claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish the claim. The Tribunal does not have any responsibility or obligation to specify, or assist in specifying any particulars of the claim, or to establish or assist in establishing the claim: s.5AAA. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)

Nationality

37. On the basis of the applicant's Fijian passport produced at the hearing, the Tribunal finds that the applicant is a citizen of the Republic of Fiji. 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 Fiji. 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 Fiji, the Tribunal also finds that Fiji is the applicant's "receiving country" for the purposes of s.36(2)(aa).

Claims related to the applicant's Indo-Fijian ethnicity and Hindu religion

38. The applicant has claimed that he was subject to threats of physical violence and sexual harassment by indigenous Fijians at his workplace when he was [Occupation 1]. However, he left this position a year before departing Fiji, and sought employment in his former trade as an [Occupation 2] in Suva. The applicant has claimed that he was discriminated at this workplace when he was discriminated against and verbally abused by his indigenous supervisor on the basis of his ethnicity and religion and that this would continue if he were to return to Fiji and find another job.

39. The Tribunal accepts that there are ethnic tensions between indigenous and Indo-Fijians in Fiji. DFAT has assessed that Indo-Fijians face a low level of official and societal discrimination on the basis of their race/nationality.¹ The DFAT report also states that the Constitution is non-discriminatory on the grounds of religion and provides specifically for protection from religious discrimination and religious freedom is observed in practice.²
40. The Tribunal accepts that the applicant has experienced some discriminatory practices and verbal abuse and on one occasion, sexual harassment during his employment as [Occupation 1]. The Tribunal accepts the applicant's evidence that he experienced some discrimination in his place of employment in Suva, however, he was never physically harmed, threatened with loss of life, torture or physical harm, sexual abuse or mistreatment at this workplace. He claims to fear further discrimination, insults and possible harassment at his workplaces.
41. The applicant did not claim to have suffered any serious harm (having regard to the examples provided in s.91R(2) of the Act as outlined in paragraph 10 above) or significant harm (having regard to the exhaustive definitions in s.36(2A) and s.5(1) of the Act and summarised in paragraph 17 above) in Fiji in the past. Nor does he claim to fear such harm if he returns to Fiji now or in the foreseeable future.
42. Taking the above findings into consideration both individually and cumulatively, the Tribunal is not satisfied that there is a real chance that the applicant will be persecuted for reasons of his race, nationality, religion or membership of a particular social group ([his two occupations]). Furthermore, the Tribunal is not satisfied that there is a real risk that the applicant will suffer significant harm in Fiji for reasons of his ethnicity, religion or his occupation.

Claims related to openly campaigning for the Fiji First political party

43. The applicant told the Tribunal that he actively campaigned for the Fiji First party during the last elections and had a banner for that party in his [vehicle]. He was the only Indo-Fijian at his workplace and he 'felt' that some of the indigenous Fijians at his workplace who did not vote for Fiji First did not like what he was doing and so he removed the banner from his [vehicle]. The applicant said that he was not actually threatened or harmed in any way as a result of his activities for the Fiji First party.
44. The Fiji First party won elections in September 2014 and holds a substantial majority in parliament. The Prime Minister is an indigenous Fijian. A range of opposition political parties were able to contest the elections. "*Overall, DFAT assesses that senior members of opposition political parties (i.e. those running for office) in Fiji are at a moderate risk of being monitored and intimidated by security services (and) at low risk of being arbitrarily detained or otherwise harassed.*"³ There is no independent evidence before the Tribunal that Indo-Fijians who voted for the Fiji First party are at any risk of serious or significant harm. Even for those who are openly critical of the government, DFAT assesses there is a low risk of torture, cruel, human or degrading treatment or punishment.⁴
45. Based on the above information, the Tribunal is not satisfied that there is a real chance or a real risk that the applicant would suffer serious or significant harm as a result of his imputed or actual political opinion or political activities.

CONCLUSION

¹ Department of Foreign Affairs and Trade (DFAT) Country Report Fiji, 14 April 2015, p.11-12

² Ibid p.13

³ Ibid p.18

⁴ Ibid p.22-23

46. 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).
47. 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).
48. 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

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

Belinda Mericourt
Member