

1414536 (Refugee) [2016] AATA 3827 (8 May 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1414536
COUNTRY OF REFERENCE:	Nepal
MEMBER:	Mara Moustafine
DATE:	8 May 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 08 May 2016 at 5:17pm

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431 of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. The [applicant] is a citizen of Nepal who is aged [age]. She arrived in Australia [in] November 2005 on a [temporary] visa together with her husband, from whom she is now separated, and [number] children.
2. The family first lodged a protection visa application [in] December 2005, which was refused [in] March 2006 (the first delegate's decision). The applicants sought review by the Tribunal, differently constituted, (the first Tribunal) and the first delegate's decision was affirmed on [in] August 2006. In 2006 and 2007 the applicants lodged sequential appeals for judicial review to the Federal Court, the Full Federal Court and the High Court, which were unsuccessful, as was their application for Ministerial Intervention in 2008.
3. [in] February 2014, the applicant individually launched another protection visa application on complementary protection grounds. The application was deemed valid as a result of the Federal Court judgement in SZGIZ v MIAC, which found that s.48 did not prevent a person making another protection visa application on complementary protection grounds. The second delegate refused to grant the visa [in] July 2014 and the applicant applied to the Tribunal for review of this decision on 26 August 2014.
4. The applicant appeared before the Tribunal on 5 May 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages.
5. As the applicant's claims had previously been assessed against the Refugee criterion and she was found not to have a well-founded fear of being persecuted in Nepal for a Convention reason, the Tribunal assessed her claims only against the Complementary Protection provisions. This was explained to the applicant at hearing.
6. The issue in this review is whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of her being removed from Australia to Nepal, there is a real risk that the applicant will suffer significant harm.

CLAIMS AND EVIDENCE

7. According to her protection visa application and detailed statement, the applicant was born in [her home district in] Dailekh, Nepal in [year]; was now a Christian, though a Hindu by birth; and completed [number] years of school; and could read, write and speak English as well as Nepali. She married her husband in an arranged marriage when she was [age] years old; then lived for [number] years with him in [Country 1], where he worked as [an occupation], while she looked after her [children] and did housework.
8. The applicant came to Australia [in] November 2005 with her husband, but separated from him in 2008. Since arriving in Australia, she worked in [Industry 1] for 3 years between 2006 and 2009 and in [Company 1] since 2010. Her [Child 1], now [age] years old, is a permanent resident of Australia, while her [age]-year-old [Child 2] is living in Nepal. Her parents [and married siblings] also live in Nepal.
9. The applicant claims she is a victim of family violence and that her husband abused her and left her. She said the marriage had 'been ok' until the time she converted to Christianity. While her husband himself followed the Christian religion for nearly a year, he later abused the applicant for her conversion to Christianity. She wrongly believed that he attended church 'religiously', but found that he attended only socially.

10. The applicant said her husband became very abusive towards her in Australia, complaining and blaming her for every bad thing that happened to him. He refused to divorce her and threatened to kill her. While she was beaten on many occasions, she was forced to remain silent about the abuse for the sake of her children and 'not allowed to socialise with any man or accompany the man'. As her husband was always polite to other people, no one believed he was violent and blamed her instead. [In] January 2008, the husband slapped and threatened the applicant with a knife. She felt he would kill her any time if she stayed with him so 'was separated' from him [two days later].
11. She fears that if she returns to Nepal she will face a real risk of harm as a single woman separated from her husband and without male protection; be considered 'morally corrupt', targeted and harmed in the male dominated society and forced into sex trafficking. As a separated mother, she will face harm, not only from her former husband and members of his family, but also from Hindu extremists. The applicant claims that her relatives in Nepal will see her as an outcast due to her 'religion conversion' and separation and she will be forced to live in a situation of extreme vulnerability.
12. She believes she cannot get state protection because Nepalese society is male dominated and the authorities cannot provide protection to her in a situation of domestic violence, as such women are not treated with respect. Nor is India a safe place for her as a single woman as she has seen television and newspaper reports of trafficking of women and children and rape of women in India. She has a real fear of being discriminated, raped, tortured and murdered if she goes back to Nepal or India.
13. Key points from the applicant's hearing before the Tribunal were as follows:
 - a. She was separated from her husband since 2008, but not divorced.
 - b. Her husband and [Child 2] were living in Kathmandu after their return to Nepal in 2009, but she did not know where they were now and did not know what they were doing. She last spoke with her [Child 2] about two years ago. She had no contact with her husband since he left Australia, but before leaving he threatened that, if she went back to Nepal, he would 'do something bad' to her.
 - c. Her parents had both passed away around 20 years ago. She did not have contact with her siblings in Nepal.
 - d. She only had occasional contact with her [Child 1], who was a permanent resident in Australia, married and worked as [an occupation]. She also had one or two friends here.
 - e. She was a Christian but everyone else in her family, including her husband and children were Hindu.
 - f. She came to Australia in November 2005 because her husband asked her to do so. They came on [temporary] visas valid for [number] months but as soon as she came here, she wanted to stay here for her children's future.
 - g. During that time, she changed religion and her relations with her husband deteriorated. Her husband believed in Christianity for a year, then blamed her for making him a Christian. They argued about it and he bashed her, showed her a knife and threatened to kill her.
 - h. The applicant became a Christian in Australia in 2006 after being taken to church by some Christian friends. She liked Christianity because there was no discrimination between rich and poor, no caste system or racism and everybody was equal.
 - i. Asked several times how she became a Christian, the applicant spoke vaguely about believing in God, who came into her soul and that she went to the [named] church in [Suburb 1] and participated there and became a Christian. Asked how her husband became a Christian, she said that, at the time they were together in a family and believed that everybody should be Christian.
 - j. Asked several times whether she went through any formal process or ceremony, the applicant said variously that she used participate in ceremonies or gatherings every

- fortnight on Fridays to sing holy songs and pray to God. However, she did not have to go through any formal ceremony to become a Christian.
- k. She no longer goes to church as she is depressed and does not believe that going to church means someone is a Christian or that staying at home means that they are not.
 - l. Asked why she and her husband applied for protection visas in 2005, the applicant said 'to live here in Australia'. There was no other reason.
 - m. The applicant claimed that if she went back to Nepal, she could not feel secure or get any protection, as she did not have anyone in Nepal. She said she had no contact with anyone in Nepal, including her [siblings], who were married and lived in the village. Since she separated from her husband everyone looked at her negatively as it was traditional that, once a woman left her husband, everyone took it negatively and no one would give her protection. Maybe for a couple of days people would look after her, but then no.
 - n. The applicant said she was last in Nepal in 2003 and really didn't know anything about Nepal as she went to [Country 1] when she was [age] years old and only went to Nepal for holidays.
 - o. Asked why she was afraid to return to Nepal now, the applicant said she was scared of her husband, who threatened to do something to her before he left and harmed her in Australia as well. She said variously that he was waiting for her and that she was afraid he would find her and she would have to see her [Child 2]. Asked why and how this would happen, given that she had not had contact with her husband since 2008 and not spoken to her [Child 2] for two years, the applicant said variously that they would definitely find her one day but that their relations could not be as before, when they were together, and they could no longer support each other. She confirmed that all this was because she became a Christian.
 - p. Asked several times what she thought her husband might do to her in Nepal, the applicant spoke in generalities, saying he would not let her be happy and would not accept her and that no one would protect or support her as her husband had left her.
 - q. The applicant said several times that she feared that if she had to return to Nepal she would not be happy as she had no one to support her and if she could not support herself, she would not survive there. Moreover, she didn't know anything about Nepal.
 - r. To the Tribunal's suggestion that she did not know anything about Australia before she came here, the applicant said she had learned many things in a short period in Australia, including about human rights. Before she had a family and kids, but now she had no one.
 - s. Since arriving in Australia she worked in [Industry 1] for three years; then as [an occupation] for [Company 1] three days a week, which she was still doing. She lived with a Nepalese friend in [Suburb 2].
 - t. In a discussion as to why she could not support herself in Nepal, given that she had shown herself to be very resilient; managing to find work and a place to live for ten years in Australia, a strange country with a strange culture, the applicant said 'Why not? If I want to work here, I can get a job here. But in Nepal, even if I want to work, I cannot get any job there'. She claimed this was because she was not educated, had no property or savings, had not lived in Nepal for a long time and did not know anything about the country. The Tribunal suggested that her work experience in Australia and English skills would stand her in good stead to find work in Kathmandu, the most 'Westernised' area of Nepal.
 - u. Asked if there were any other reasons she was afraid to return to Nepal, the applicant said she had fear from the Hindu side, as all her family were Hindus there and lived in the village. She said she would be lonely in Nepal and have no one to support her as she was separated from her husband and her children had no feelings for her because traditionally, a mother who leaves a father is considered to be at fault.
 - v. The applicant confirmed that her migration history as set out in the Department's decision record and summarised at paragraph 2 above was correct.
 - w. The Tribunal discussed with the applicant country information regarding Christianity and the situation of women in Nepal, including that contained in the delegate's decision, of which she had a copy. These included changes in Nepal since the end of the monarchy,

with Nepal becoming a secular state and Hinduism no longer the official religion and growth in the number of Christians in Nepal, as well as improvements in the situation for women, particularly in Kathmandu. The applicant responded that many things were changing in Nepal, but only on paper and not in practice, that there was no law and order or good governance unless you had money. She then added that she did not know anything about Nepal.

RELEVANT LAW

14. Section 48A imposes a bar on a non-citizen making a further application for a protection visa while in the migration zone in circumstances where the non-citizen has made an application for a protection visa which has been refused. The Full Federal Court in *SZGIZ v MIAC* (2013) 212 FCR 235 has held at [38] that the operation of s.48A, as it stood at the time of this visa application, is confined to the making of a further application for a protection visa which duplicates an earlier unsuccessful application for a protection visa, in the sense that both applications raise the same essential criterion for the grant of a protection visa. The Federal Court in *AMA15 v MIBP* [2015] FCA 1424 upheld the Tribunal's approach of considering only claims in relation to the complementary protection criterion in s.36(2)(aa), where the applicant had previously been refused a visa on the basis of the refugee criterion in s.36(2)(a). In light of these authorities, the Tribunal has considered the applicant's claims only in relation to s.36(2)(aa).
15. As indicated above, the applicant has previously been refused a Protection visa in Australia. However, the visa application under review is a valid application because the applicant is considered 'SZGIZ-affected' as she has not left Australia since the final determination of her previous Protection visa application which preceded the Complementary Protection laws. As the applicant has previously had her claims for protection assessed under s.36(2)(a), the Tribunal must confine its consideration to whether she satisfies the requirements of s.36(2)(aa) and (c).
16. The Complementary Protection provisions (see attachment for the full text of these provisions) in s.36(2)(aa) essentially require that the applicant is a non citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because there are 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'. Significant harm is defined in s.36(2A) of the Act to include that the non citizen will be arbitrarily deprived of his or her life; the death penalty will be carried out on the non-citizen; the non citizen will be subjected to cruel or inhuman treatment or punishment; or the non citizen will be subjected 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.

CONSIDERATION OF CLAIMS AND EVIDENCE

Are there substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk that she will suffer significant harm?

17. On the basis of the applicant's passport and in the absence of evidence to the contrary, the Tribunal accepts that she is a national of Nepal and assesses her complementary protection claims in reference to Nepal as the receiving country.
18. The applicant's key claims – that her husband abused and threatened to kill her because she converted to Christianity and made him a Christian and that, if she returned to Nepal as

a single woman separated from her husband she would suffer significant harm – were vague and unsupported by evidence, beyond her own assertions.

19. For reasons set out below, the Tribunal is not satisfied that the applicant has been a truthful or reliable witness regarding her claims and the reasons she fears returning to Nepal and has concluded that her claims are not credible. Having regard to the claims and evidence before it, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal from Australia to Nepal, there is a real risk that she will suffer significant harm.
20. By her own evidence at paragraph 13.f and 13.i, the applicant wanted to stay in Australia 'for her children's future' as soon as she came here in November 2005 and she and her husband applied for their original protection visas in 2005 in order 'to live here in Australia' and for no other reason.
21. As discussed with the applicant, the Tribunal is concerned about significant inconsistencies, including on issues central to her claims, between her evidence at hearing and other information available to the Tribunal, as set out below. This information was put to the applicant at hearing in accordance with s.424AA of the Act, and she was invited to provide her comment or response in an agreed timeframe. The Tribunal noted that the relevance of the information was that it raised doubts about the applicant's truthfulness and general credibility.

Christianity

22. The applicant told the Tribunal that she and her husband became Christians in Australia in 2006, without going through any formal ceremony, and that she was the only one in her family who was Christian, although her husband came to church for a year. However, according to the first Tribunal's decision of 23 August 2006, in a section headed 'Evidence of applicant wife' the applicant is recorded as saying at her first Tribunal hearing on 11 July 2006 that she, her husband and her [Child 1] became Christians in 2000 in [Country 1], although she and her husband were baptised in Australia in March 2006; while her [Child 1] was baptised in [Country 1] in August 2005.
23. The applicant opted to respond immediately, saying that, at that time her husband applied and did everything in order to stay in Australia and that she really didn't know whether or not he believed in God. She said that she and her children were his dependents and that her husband did everything related to the application process, while she didn't know what he did.
24. As discussed with the applicant, the Tribunal does not find this credible, as it is the applicant's evidence to the first Tribunal that it was referring to, not that of her husband. Nor did the Tribunal find convincing the applicant's response when the Tribunal read her an excerpt from the decision, including that 'The applicant wife reiterated the claims set out in the statement provided by the applicants both to the Department and the Tribunal', that she could not remember everything she said before and that maybe it was true, but she did not know about these things.
25. In view of the serious inconsistencies in her evidence, the Tribunal is not satisfied that the applicant has been truthful in her claim that she converted to Christianity and made her husband a Christian. Given her evidence at paragraph 13.o, that all her problems with her husband were caused 'because she became a Christian', the Tribunal does not accept that the alleged problems in fact occurred, including that he abused, bashed and threatened to kill the applicant. Nor does the Tribunal accept that the applicant separated from her husband as a result, or that she will suffer the consequences of this should she return to Nepal, as claimed.

Return to Nepal

26. The applicant told the Tribunal that she could not return to Nepal for various reasons, including that she had no one to support her. By contrast, in her evidence to the Migration Review Tribunal (MRT), as recorded in its decision record dated 17 December 2009 in relation to a [temporary] visa application, the applicant said several times that she wanted to return to Nepal: including that she was not happy staying in Australia, did not want to continue to live in [her current situation] and did not want to be a burden on her [Child 1]. She also stated that, although she did not know where she would live in Nepal, friends would help her and her friend would arrange for her to go to a village in Nepal. Furthermore, in spite of giving an undertaking that she would leave Australia forthwith, she did not do so.
27. The applicant responded that she was in [a certain location] at the time and said these things 'just to get out of [there]', that she just wanted to [move on] and had no intention to go to Nepal.
28. Given the applicant's evidence that she was prepared to lie to the MRT in order to [gain more time in Australia], it is the Tribunal's view, that she would equally be prepared to lie to the Tribunal in order to get a protection visa. When this was discussed with the applicant at hearing, she did not respond directly, but said that her life was messed up; she was separated from her husband and children and lonely; and that her life was in the hands of the Tribunal. The Tribunal emphasised that its only role was to assess whether the applicant was owed protection by the Australian government on the grounds that there were substantial grounds for believing that, if she were returned to Nepal, she would face significant harm as defined in the Act.

Separation from husband

29. The applicant's evidence in her protection visa application and at hearing was that she separated from her husband in January 2008. However, according to the abovementioned MRT decision record, she attended several interviews with the Department regarding [temporary] visas in March 2009 and July 2009 together with her husband and children. Only at this last interview, by which time the family had been notified that their Ministerial intervention request had been unsuccessful ([in] June 2009), did the applicant indicate a different address from the rest of the family. She told the Department she had been living at this address for over a year – in breach of the conditions of her [temporary] visas issued in March and June 2009 to reside at a specified address and notify any change of address – although she did not provide any documents to confirm this change of address.
30. The applicant responded that it was true that she and her husband had separated, but as they had made a joint application, they had to come to the interviews together. The Tribunal finds this explanation disingenuous, especially as the applicant was unable to provide any documents demonstrating that she was living at the new address. The Tribunal is not satisfied that the applicant and her husband in fact separated, as claimed, and notes that it has not accepted the alleged basis for the separation at paragraph 25 above.

Migration History

31. As discussed with the applicant, the Tribunal's concerns about her credibility and truthfulness are exacerbated by aspects of her migration history, as set out in the primary decision record, and which she confirmed as accurate, as well as in the MRT decision record mentioned above. These show that after her first protection visa application was refused and in the course of her subsequent appeals to the courts, she stayed in Australia unlawfully on several occasions – for periods of over 3 months in 2008 and 2009; and, for a period of

almost 5 years, after the application for Ministerial intervention was unsuccessful. The applicant made no comment on this when invited to do so.

32. Considered together, the reasons discussed above lead the Tribunal to conclude that the applicant has not been truthful about the reasons she fears returning to Nepal and that none of her evidence can be relied upon. The Tribunal is not satisfied that the applicant converted to Christianity or made her husband become a Christian, notwithstanding that they may have attended church in Australia; or that her husband abused her, bashed her, showed her a knife or threatened to kill her because of this; nor that she and her husband separated in 2008 as a result, as claimed. It follows that the Tribunal does not accept that, if the applicant returns to Nepal, she will face a real risk of significant harm as a Christian convert or as a single woman separated from her husband and without male protection; be considered 'morally corrupt', targeted and harmed or forced into sex trafficking. The Tribunal is not satisfied that she will face harm from her husband, members of his family or Hindu extremists; that her relatives in Nepal will see her as an outcast, forcing her to live in a situation of extreme vulnerability; nor that she will have to live without any support or protection in Nepal, including from her own family.
33. The Tribunal accepts that the applicant would like to stay in Australia and may be apprehensive about returning to Nepal, where she has not lived for a long time. The Tribunal notes that the feared harm in this regard does not rise to the level of significant harm, as defined in subsection 36(2A) of the Act.
34. Considering the applicant's claims individually and cumulatively and having regard to all of the evidence, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk she will suffer significant harm as defined in subsection 36(2A) of the Act. In the Tribunal's view, the applicant's claims for protection have been fabricated for the purpose of achieving a migration outcome.

CONCLUSIONS

35. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations. Therefore the applicant does not satisfy the criterion set out in s.36(2)(aa) for a protection visa and finds the requirements of that section are not met.
36. 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) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

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

Mara Moustafine
Member

ATTACHMENT - RELEVANT LAW

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

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

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

Complementary protection criterion

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

Ministerial direction

40. In accordance with Ministerial Direction No. 56, made under section 499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration and Citizenship - 'PAM3: Refugee and humanitarian - Complementary Protection Guidelines' and 'PAM3: Refugee and humanitarian - Refugee Law Guidelines' -

and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

Credibility