

1512699 (Refugee) [2016] AATA 3820 (9 May 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1512699
COUNTRY OF REFERENCE:	India
MEMBER:	Amanda Paxton
DATE:	9 May 2016
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a protection visa.

Statement made on 09 May 2016 at 12:45pm

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 [in] August 2015 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 India applied for the visa [in] April 2015.
3. The applicant appeared before the Tribunal on 6 May 2016 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages when required.

CRITERIA FOR A PROTECTION VISA

4. 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, he or she 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.
5. 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 because the person is a refugee.
6. A person is a refugee if, in the case of a person who has a nationality, they are outside the country of their nationality and, owing to a well-founded fear of persecution, are unable or unwilling to avail themselves of the protection of that country: s.5H(1)(a). In the case of a person without a nationality, they are a refugee if they are outside the country of their former habitual residence and, owing to a well-founded fear of persecution, are unable or unwilling to return to that country: s.5H(1)(b).
7. Under s.5J(1), a person has a well-founded fear of persecution if they fear being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, there is a real chance they would be persecuted for one or more of those reasons, and the real chance of persecution relates to all areas of the relevant country. Additional requirements relating to a 'well-founded fear of persecution' and circumstances in which a person will be taken not to have such a fear are set out in ss.5J(2)-(6) and ss.5K-LA, which are extracted in the attachment to this decision.
8. 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 the 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 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'). The meaning of significant harm, and the circumstances in which a person will be taken not to face a real risk of significant harm, are set out in ss.36(2A) and (2B), which are extracted in the attachment to this decision.

Mandatory considerations

9. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal has taken 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 relevant country information assessments 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.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The applicant's claims, as presented at a hearing with the Tribunal, can be summarised as follows.
11. The applicant, now [age] years old, grew up in a village near [a city] in Punjab. He came to Australia for the purpose of completing 'higher study' in August 2009.
12. Two months after he arrived, the applicant's education provider went bankrupt, and he lost \$[amount]. A few months later, and after paying additional money, he enrolled in a new college and completed a [diploma], which took one year. He then enrolled in another [college], but after a week, he decided to move to [City 1] to join family friends. The applicant advised the college that he was moving to [City 1] and that he wanted to re-enrol in a college in [City 1]. He believed that the college had cancelled his enrolment but this proved not to be the case and this led to cancellation of his student visa. On the advice of his lawyer, he appealed unsuccessfully to the MRT. Overall, the applicant has wasted seven years of his life in Australia, has not been able to complete the studies he came to Australia to do, and has been away from his family. The applicant has not been permitted to work for some years and has been living with the assistance of friends. He has lost a lot of money, including loss of money to an unscrupulous migration agent.
13. The applicant's parents are expecting him to return to India having completed his studies. He has not told his parents that he has not been studying or that he has not been permitted to work. They will be upset, disappointed and disapproving of the applicant if he does not return with some achievements. The applicant will suffer embarrassment and shame as a result.
14. The applicant's father suffered a [medical condition] about three years ago when he was working in [another country] and he [had physical symptoms]. The applicant believes that his father had the [medical condition] because he was stressed after the applicant alluded to his difficulties in Australia in a phone call. The applicant's father's doctor has advised that his father must not be stressed and since then, the applicant has been telling his family lies about his situation. He wants to be able to study and achieve something before he returns to India to show his father that he has a future. The applicant fears that if he returns to India and must tell his father that he has not completed his studies his father's health will deteriorate.
15. The applicant is also scared that his relatives will blame him for his father's [medical condition], and blame him if his father's health gets worse. He does not know what they will do. They would say he has been telling lies and not done his study. The applicant will be embarrassed and ashamed for the rest of his life because he has not achieved what was expected of him.
16. The applicant has been very upset and increasingly suffering tension in relation to his difficulties in Australia because so much time has been wasted and he has wanted to start study. He has not been able to tell anyone at home about this situation, because of the disappointment and tension that would result, and this has made him feel weak, tense and

suffer from hair loss. He has told his family friends in Australia who have suggested that he see the doctor. The applicant fears his health will suffer and he may harm himself if he returns to India.

17. The police will not assist him because they do not do anything.

Findings and reasons

Country of nationality

18. The applicant claims to be a citizen of India. On the basis of the copy of the applicant's passport provided to the Department¹, the Tribunal accepts that the applicant is a citizen of India and that his identity is as he claims it to be. The Tribunal accepts that India is the country of reference for the purposes of assessing the applicant's claims under ss. 36(2)(a) and (aa).

Assessment of claims

19. The issue in this case is whether the applicant faces a real chance of serious harm or a real risk of significant harm on return to India now or in the foreseeable future.
20. The Tribunal accepts that the applicant arrived in Australia from Punjab, India in August 2009 with the intention of completing higher study. The Tribunal accepts that the applicant's parents, [relatives], and other relatives remain in India. The Tribunal accepts that the applicant has not completed study as he intended, and that he has been in Australia for seven years with little tangible result and at some expense to himself financially and emotionally.
21. On the sincere evidence of the applicant, the Tribunal accepts that applicant's parents will be deeply disappointed that the applicant has not achieved study outcomes from his stay in Australia. The Tribunal also accepts that the applicant's father has had a [medical condition] and that the applicant blames himself and is concerned that his father's health will deteriorate if he is confronted with news about the applicant's lack of achievement. The Tribunal acknowledges that this may be an upsetting and discomfoting situation for the applicant.
22. The Tribunal has considered whether there is a real chance that the applicant will face serious harm or a real risk that the applicant faces significant harm at the hands of his parents now or in the reasonably foreseeable future. In this respect, the Tribunal notes that at the hearing the applicant expressed no fear of harm to himself from his parents other than his experience of feelings of embarrassment and shame arising from their expression of their disappointment. The Tribunal notes that the applicant stated that he is in regular contact with this family and that they have provided him with some limited financial support a couple of times. While the applicant states that his parents are not aware of his current situation, on the evidence, while the applicant's parents may be disapproving, the Tribunal does not accept that they will withdraw their support for the applicant. While it is possible that and his father's health may be affected negatively by the unwelcome news of his son's experiences in Australia, and this is unfortunate, on the evidence, the Tribunal does not accept that the applicant will face more than expressions of disapproval and disappointment from his parents on return to India. Having regard to the non-exhaustive examples of serious harm in s.5J(5), and the definition of significant harm in s. 36(2A) of the Act, which are extracted in the attachment to this decision, the Tribunal does not accept that this treatment would amount to serious harm or significant harm. While the Tribunal accepts that applicant may

¹ DIBP, ff. 23 - 25

be subject to expressions of disapproval from his parents, the Tribunal does not accept that this will amount to serious harm or significant harm as defined.

23. The Tribunal also accepts that the applicant's relatives may express disapproval and disappointment in the applicant and may blame him for his father's ill health. At the hearing, the applicant stated that he did not know what his relatives would do in relation to their disapproval. The Tribunal notes that the applicant has not made any specific claims to fear harm from his relatives other than his feeling of shame and embarrassment arising from his failure to meet their expectations in relation to his study and their view that that his actions may affect his father's health. Having regard to the non-exhaustive examples of serious harm in s.5J(5), and the definition of significant harm in s. 36(2A) of the Act, which are extracted in the attachment to this decision, the Tribunal does not accept that any treatment the applicant will receive at the hands of his relatives would amount to serious harm or significant harm. While the Tribunal accepts that applicant may be subject to expressions of disapproval and distress from his relatives, the Tribunal does not accept that this will amount to serious harm or significant harm as defined.
24. The Tribunal has considered the applicant's claim that his own health might suffer and that he might harm himself if he returns to India without undertaking more study. The Tribunal acknowledges that the applicant has found his situation, where he feels he has wasted many years because he has not been able to study or work, stressful and upsetting. The Tribunal notes the applicant's statement at the hearing that his friends have suggested he see a doctor to discuss his stress but that he has not sought this kind of support. At the hearing, the applicant indicated that he was aware there are medical and psychological support services in Punjab if needed, but he would not seek this kind of assistance. While the Tribunal is sympathetic to the applicant's feelings of shame and stress, on the evidence, the Tribunal does not accept that the applicant will harm himself. In addition, in considering this claim, the Tribunal has regard to the concepts of 'persecution' explained by s.5J of the Act, and 'significant harm' for these purposes exhaustively defined in ss.36(2A and (2B): that the conduct faced is inflicted by another person or persons, or a third party. The Tribunal finds that the possibility that the applicant's health deteriorates or that he harms himself, noting that he will have access to basic services, does not involve the conduct of another person or persons, or third party, and does not constitute serious or significant harm on this basis.
25. Having regard to the evidence before it and considering all the applicant's claims, both individually and cumulatively, the Tribunal does not accept that the applicant faces a real chance of serious harm due to his failure to meet the expectations of his parents and relatives in his study in Australia or for any other reason set out in s5J of the Act. Consequently, the Tribunal is not satisfied that the applicant has a well-founded fear of persecution as set out in s5J of the Act.
26. The Tribunal is further not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to India, there is a real risk that the applicant will suffer significant harm from his parents or relatives because he has not achieved their expectations in relation to his studies in Australia, or for any other reason.
27. Given the Tribunal's findings above that the applicant does not face a real chance of serious harm or a real risk of significant harm at the hands of his parents or relatives now or in the foreseeable future, the Tribunal finds that the applicant will not require the protection of the state in India and has therefore not addressed the applicant's the claim that the police will not protect him because they do not do anything.

CONCLUSION

28. 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 s.36(2)(a).
29. 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).
30. 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

31. The Tribunal affirms the decision not to grant the applicant a protection visa.

Amanda Paxton
Senior Member

ATTACHMENT - Extract from *Migration Act 1958*

5 (1) Interpretation

...

cruel or inhuman treatment or punishment means an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature;

but does not include an act or omission:

- (c) that is not inconsistent with Article 7 of the Covenant; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

degrading treatment or punishment means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the Covenant; or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

torture means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
 - (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
 - (c) for the purpose of intimidating or coercing the person or a third person; or
 - (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
 - (e) for any reason based on discrimination that is inconsistent with the Articles of the Covenant;
- but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.

...

receiving country, in relation to a non-citizen, means:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

...

5J Meaning of well-founded fear of persecution

- (1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well-founded fear of persecution if:
 - (a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
 - (b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and
 - (c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.
- (2) A person does not have a well-founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.
- (3) A person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:
 - (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
 - (b) conceal an innate or immutable characteristic of the person; or
 - (c) without limiting paragraph (a) or (b), require the person to do any of the following:
 - (i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in their practice of his or her faith;

- (ii) conceal his or her true race, ethnicity, nationality or country of origin;
 - (iii) alter his or her political beliefs or conceal his or her true political beliefs;
 - (iv) conceal a physical, psychological or intellectual disability;
 - (v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;
 - (vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.
- (4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):
- (a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - (b) the persecution must involve serious harm to the person; and
 - (c) the persecution must involve systematic and discriminatory conduct.
- (5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of serious harm for the purposes of that paragraph:
- (a) a threat to the person's life or liberty;
 - (b) significant physical harassment of the person;
 - (c) significant physical ill-treatment of the person;
 - (d) significant economic hardship that threatens the person's capacity to subsist;
 - (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
- (6) In determining whether the person has a well-founded fear of persecution for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

5K Membership of a particular social group consisting of family

For the purposes of the application of this Act and the regulations to a particular person (the first person), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- (a) disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a); and
- (b) disregard any fear of persecution, or any persecution, that:
 - (i) the first person has ever experienced; or
 - (ii) any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph (a) had never existed.

Note: Section 5G may be relevant for determining family relationships for the purposes of this section.

5L Membership of a particular social group other than family

For the purposes of the application of this Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:

- (a) a characteristic is shared by each member of the group; and
- (b) the person shares, or is perceived as sharing, the characteristic; and
- (c) any of the following apply:
 - (i) the characteristic is an innate or immutable characteristic;
 - (ii) the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it;
 - (iii) the characteristic distinguishes the group from society; and
- (d) the characteristic is not a fear of persecution.

5LA Effective protection measures

- (1) For the purposes of the application of this Act and the regulations to a particular person, effective protection measures are available to the person in a receiving country if:
- (a) protection against persecution could be provided to the person by:
 - (i) the relevant State; or

- (ii) a party or organisation, including an international organisation, that controls the relevant State or a substantial part of the territory of the relevant State; and
 - (b) the relevant State, party or organisation mentioned in paragraph (a) is willing and able to offer such protection.
- (2) A relevant State, party or organisation mentioned in paragraph (1)(a) is taken to be able to offer protection against persecution to a person if:
- (a) the person can access the protection; and
 - (b) the protection is durable; and
 - (c) in the case of protection provided by the relevant State—the protection consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system.

..

36 Protection visas – criteria provided for by this Act

...

- (2A) A non-citizen will suffer **significant harm** if:
- (a) the non-citizen will be arbitrarily deprived of his or her life; or
 - (b) the death penalty will be carried out on the non-citizen; or
 - (c) the non-citizen will be subjected to torture; or
 - (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
 - (e) the non-citizen will be subjected to degrading treatment or punishment.
- (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
- (a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or
 - (b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
 - (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

...