

1302703 [2013] RRTA 683 (2 October 2013)

DECISION RECORD

RRT CASE NUMBER: 1302703

DIAC REFERENCE(S): CLF2010/161685 CLF2012/183170

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Adrian Ho

DATE: 2 October 2013

PLACE OF DECISION: Melbourne

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

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the Migration Act 1958 and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of India, applied to the Department of Immigration and Citizenship (the Department or DIAC) for the visa on 4 September 2012 and the delegate refused to grant the visa on 30 January 2013.
3. The Tribunal wrote to the applicant advising that it had considered the material before it and that it was unable to make a favourable decision based on that material. The Tribunal's letter was sent by pre-paid post and dispatched within three working days of the date on the letter, to the last residential address provided by the applicant in connection with the review. I am satisfied that the Tribunal's letter complied with the provisions of s.441A(4).
4. The applicant was invited to appear before the Tribunal to give evidence and present arguments on 6 September 2013 at the Tribunal's Melbourne Registry.
5. The applicant did not appear before the Tribunal on the day and at the time and place that he was scheduled to appear. He made no contact with the Tribunal to explain his non-attendance. The Tribunal waited almost a month before making this decision. The applicant has not made any contact with the Tribunal in that time.
6. In the above circumstances, and pursuant to s.426A of the Act, the Tribunal has decided to make its decision on the review without taking any further action to enable the applicant to appear before it.

RELEVANT LAW

7. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

8. 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).
9. 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.

10. 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.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. 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.
13. 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.
14. 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.
15. 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.
16. 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.

17. 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

18. 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').
19. '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.
20. 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

21. 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.

CONSIDERATION OF CLAIMS AND EVIDENCE

22. In his application forms 866C and 866B the applicant indicates:
 - a. He was born in Nawanshahr, Punjab, India in [a certain year].
 - b. He speaks, reads, and writes Punjabi and English.
 - c. He is of Sikh religion.
 - d. He arrived in Australia in 2009 on an Indian passport.
 - e. He was divorced in India.

- f. His only address in the last 10 years outside Australia was in the Nawanshahr.
- g. He has [a number of] years of education, including in Nawanshahr and [Australia].
- h. His occupation is in [a certain industry]. He helped in his father's business for 5 years and earned \$1200 a month working in a [business].
- i. His parents and [sibling] reside in India. In particular, his [father], is married and his country of residence is India.

23. He also makes the following claims:

- a. His family had a political dispute with the 'other party' and 'they' threatened his family and attacked him 2-3 times.
- b. His country has some political groups and everyone is famous on their own side.
- c. His family opposed one group and they became their enemies.
- d. One day he was returning from school and they just attacked him and his bike broke down.
- e. After a year, he was working on a farm and people came with covered faces and beat him harshly and he was injured badly.
- f. He is the elder child and the only son.
- g. They will definitely do that to him again as they gave many threats against him to his family. They want revenge and to 'let his family down' in front of other political groups.
- h. Political parties and police take bribes from the 'other party' and have not listened to anything from his side for a long time.

24. The applicant provided a copy of the delegate's decision record to the Tribunal (RRT file folio 16). All references to the delegate or the delegate's decision are references to material contained in this document. In that record the delegate:

- a. Noted he arrived in Australia in January 2009 on a student visa.
- b. Noted he was an unlawful non-citizen from June 2011 to September 2012, when he lodged the protection visa application.
- c. Noted his further statements as follows:
 - i. He is in a land dispute with his paternal uncle, the brother of his deceased father, regarding property left by his paternal grandfather.
 - ii. His uncle is a member of the Akali Dal party; the applicant is a member of Congress.

- iii. His father died in [the late 1980s] and his mother and uncle had a dispute over his father's property.
 - iv. When the applicant entered a dispute with his uncle, his uncle used political support to intimidate him, and he came to Australia on account of this dispute.
 - v. He sought police protection; however, police failed to resolve the matter and he suspects they are taking bribes from his uncle.
- d. Found the applicant's claims did not engage any of the Convention-reasons.
 - e. Found that the state would not fail to protect him for any of the Convention-reasons.
 - f. Found he did not meet the refugee criterion.
 - g. Doubted that the land dispute was heightened by either party's political affiliations.
 - h. Doubted the severity of the dispute given that his mother continues to reside in close proximity to his uncle; also the place where the applicant resided until his departure to Australia.
 - i. Noted that the only direct altercations between the parties were verbal in nature and involved physical pushing.
 - j. Found he could obtain state protection sufficient to remove a real risk of significant harm to him.
 - k. Found he had existing family networks that could provide him with support, a support which had been afforded to his mother.
 - l. Found he did not meet the complementary protection criterion.

COUNTRY INFORMATION

Political Situation in the Punjab

25. The state of Punjab is governed by a ruling coalition of the Shiromani Akali Dal (SAD) and the Bharatiya Janata Party (BJP). The coalition gained power in the last Punjab Assembly elections, held in February 2007, where it won 67 seats. The incumbent Indian National Congress Party (Congress) under the then Chief Minister, Captain Amarinder Singh came in second with 44 votes.¹ SAD is a state based party maintaining a Sikh identity which has allied itself with the nation-wide Hindu-nationalist BJP. Sardar Parkash Singh Badal is Punjab's Chief Minister, equivalent to an Australian state Premier.²

¹ 'Punjab Assembly Election 2007 Results' 2007, Indian Elections website, 27 February <http://www.indian-elections.com/assembly-elections/punjab/election-result-07.html> – Accessed 30 June 2010

² 'Meet the Chief Minister' (undated), Punjab Government website <http://www.punjabgovt.nic.in/GOVERNMENT/meetChiefMinister.htm> – Accessed 30 June 2010

26. In May 2010, it was reported that Congress was welcoming back its Punjab leader,³ former Chief Minister Singh whose expulsion from the State Assembly for an alleged land allotment scam was overturned in April by the Supreme Court.⁴ Some commentators say that both the Congress and the ruling parties are failing to perform. A June 2010 article states that “the general perception is that Punjab Chief Minister has not [sic] control over administration” and that there was “non-governance” from the SAD-BJP government, while Congress is “scattered and facing the identity crisis”.⁵ According to one article from the Max About website, the current SAD-BJP rule in Punjab was characterised by a failing economy, deteriorating law and order, and the re-emergence of militancy.⁶
27. Being a majority Sikh state, Punjab’s politics are characterised by Sikh related issues including their historical struggle for independence. This struggle saw fighting between Khalistan separatists and the Indian government in the 1980s. The current ruling party, SAD, also referred to as Akali Dal, was involved in some of the agitation against the government during this period, though not wholly allied with the militants. SAD was said to represent the Sikh peasantry, while Congress at the time represented more of the urban, Hindu, Punjabis. Today, both the Congress and BJP have urban constituencies within the state while the SAD is more popular rurally.^{7 8} During the conflict, anti-Sikh riots occurred throughout India leading to thousands of Sikhs being killed after the then Congress Prime Minister, Indira Gandhi was assassinated in 1984. Several Congress party figures were implicated as ringleaders in the riots.⁷
28. This history continues to influence allegiances in Punjab politics today as well as affecting the manoeuvring of the major parties. The legacy of the conflict continues to cause tensions between certain Sikh bodies and the Congress party.^{9 10} This is sometimes exploited by the SAD-BJP government which argued in a June 2010 article that “successive Congress governments at the centre and in the state had betrayed the people of Punjab”.¹¹ In the last few years, these tensions have played out in the ongoing conflicts between the various relatively new religious sects which have both Sikh and non-Sikh followers, and the Sikh establishment.^{12 13} The Congress party is said to draw support from sect members while the SAD attracts more of the orthodox

³ Dewan, U. 2010, ‘Patiala Congress readies to welcome Amarinder’, *The Tribune*, 11 May <http://www.tribuneindia.com/2010/20100512/punjab.htm#5> – Accessed 30 June 2010

⁴ ‘Supreme Court quashes Amarinder Singh’s expulsion from Assembly’, *NDTV*, 26 April <http://www.ndtv.com/news/india/supreme-court-quashes-amrinder-singhs-expulsion-from-assembly-20925.php> – Accessed 30 June 2010

⁵ ‘Punjab Congress faces political vaccume, PPCC Chief is mute spectator’ 2010, *Punjab News Line*, 23 June

⁶ Jain, P. 2008, ‘Punjab Politics’, MaxAbout website, 26 January <http://articles.maxabout.com/politics-government/punjab-politics/article-6634> – Accessed 30 June 2010

⁷ Amnesty International 2003, *INDIA: Break the cycle of impunity and torture in Punjab*, ASA2000203, Amnesty International website <http://www.amnesty.org/en/library/asset/ASA20/002/2003/en/5a5e5bb5-d758-11dd-b024-21932cd2170d/asa200022003en.html> - Accessed 30 June 2010

⁸ Singh, J. 2010, ‘BJP claims it may take revolt to ‘logical conclusion’’, *The Tribune*, 24 June <http://www.tribuneindia.com/2010/20100625/punjab.htm#1> – Accessed 30 June 2010

⁹ US Department of State 2010, *Country Reports on Human Rights Practices for 2009 – India*, 11 March

¹⁰ Singh, H. 2009, ‘Operation Bluestar’s bitter legacy 25 years on’, *The Independent*, 2 June

¹¹ ‘Keep Away from Sikh Religious Matters, Badal tells Congress’, *Punjab Mail Online*, 25 June http://www.punjabmailonline.com/Punjab_News_news2.aspx#41729 – Accessed 30 June 2010

¹² ‘Ashutosh Maharaj, Gurmit Ram Rahim Singh and Baba Piara Bhaniarewala - are on the hit list of Khalistan separatist’ 2010, *Sikh Press*, 21 March <http://www.sikhpress.com/story/731> – Accessed 30 June 2010

¹³ Singh, J. 2007 ‘What is behind Sikh protests?’, *BBC*, 18 May http://news.bbc.co.uk/2/hi/south_asia/6670569.stm - Accessed 26 November 2009

Sikhs¹⁴ The support for Congress of one sect, the Dera Sucha Sauda, was made overt in March 2007 which led to some of the largest clashes between a sect and Sikh SAD supporters. While clashes between sect followers who are Congress supporters and mainstream Sikhs who are SAD-BJP supporters have occurred on many occasions, the latter identify much more with SAD than they do with the pro-Hindu BJP. The clashes are described as being between the sects and mainstream Sikhs, not between Congress supporters and the BJP.¹³ The most extreme Sikh groups however, seem to be critical of all the major parties in the state.¹⁵

29. Some blame the rise of the sects on the Indian government which they say is seeking to use them to divide Sikhs and dilute their separate identity.¹⁶ Others argue that Khalistan militants are attempting to further their separatist aims through sparking sectarian violence between mainline Sikhs and the sects.¹² It is assessed that both arguments are likely to have elements of truth to them.
30. Not only are sect followers Congress supporters but they are also usually low caste, often Dalits.¹⁷ The division between orthodox Sikhs and Dalits took on a new twist recently when one sect, the Dera Sachkhand Ballan, announced it was setting up a completely new religion 'Ravidassia' It is described as a further indication of Dalits strongly asserting their own identity in a state where they have long been suppressed.¹⁸
31. Related to the religious and caste divisions in Punjabi politics is the simmering class conflict with growing agitation amongst Left bodies representing labourers, Dalits and marginal farmers, against the SAD-BJP government. They feel the government does not have any solutions for them and has not paid adequate attention to them. While it is unlikely to lead to violence at this stage, there are fears amongst state authorities of a growing 'Naxal' or Maoist ideology in the state, with prominent Naxal leaders having visited in the last few years.¹⁹ The Naxalite rebels, who control large swathes of eastern India, were recently referred to by Prime Minister Singh as India's greatest internal security threat.²⁰

Clashes and violence between Congress and SAD-BJP

32. Violence occurred between Congress and SAD supporters in January 2007 which resulted in the killing of a SAD supporter.²¹ There were also the aforementioned clashes in May 2007 between Sikh SAD supporters and DSS followers who may have

¹⁴ 'Dera Sacha Sauda and the Sikhs of Punjab' 2007, Sepia Mutiny website, 24 May

<http://www.sepiamutiny.com/sepia/archives/004461.html> - Accessed 25 November 2009

¹⁵ 'Radical Sikh group again voices 'Khalistan' demand' 2009, *Indo-Asian News Service*, 29 April

¹⁶ Singh, K. 2007, 'Dera row: History repeats itself', *The Times of India*, 18 May

<http://timesofindia.indiatimes.com/articleshow/msid-2060379,prtpage-1.cms> - Accessed 25 November 2009

¹⁷ Zaidi, A. 2007, 'Faith and conflict', *Frontline*, vol. 24, iss.14, 14-27 July

<http://www.hinduonnet.com/fline/fl2414/stories/20070727003302800.htm> - Accessed 26 November 2009

¹⁸ Chaudhry, A. 2010, 'Religion, or a prayer for identity', *Indian Express*, 3 February

<http://www.indianexpress.com/news/religion-or-a-prayer-for-identity/574754/0> - Accessed 30 June 2010

¹⁹ Singh, J. 2010, 'Red Spread II: Extreme Left farmers' bodies give jitters to police', *The Tribune*, 23 June

<http://www.tribuneindia.com/2010/20100624/punjab.htm#1> - Accessed 30 June 2010

²⁰ 'Naxalism gravest internal security threat to nation: PM' 2010, *Indian Express*, 21 April

<http://www.indianexpress.com/news/naxalism-gravest-internal-security-threat-to/609303/> - Accessed 30 June 2010

²¹ Walia, V. & Bumbroo, S. 2007, 'Dimpa's bail plea gone; campaign on', *The Tribune*, 7 March

<http://www.tribuneindia.com/2007/20070307/punjab1.htm> - Accessed 27 November 2009

been Congress supporters.²² According to a Punjab Congress official, during elections in 2008, violence occurred where many Congress party workers were allegedly beaten and 200 hospitalised as a result of a “total subversion of democracy and law and order” under SAD-BJP rule²³ More recently, there was violence in Ludhiana which caused a clash in the Punjab Assembly in December 2009. The Ludhiana violence involved Sikhs protesting the holding of a religious congregation by leader of the Divya Jyoti Jagrati Sansthan (Divine Light Awakening Mission) sect, Ashutosh Maharaj.²⁴

33. An article in *The Tribune* from August 2007 commented on “Widespread violence, alleged rigging, booth-capturing and firing” during the municipal elections in Amritsar:

Widespread violence, alleged rigging, booth-capturing and firing today marred the civic body elections even as supporters of SAD and Congress fought pitched battles in various parts of the Holy City that left more than three dozen persons injured, including mayor Sunil Dutti.

Violence despite the presence of a heavy posse of policemen, which is reminiscent of the Bihar poll scene, is unprecedented in corporation elections here.

The police picked up Ashwani Pappu, senior Congress leader, when he went to cast his vote in the polling station. The agitating Congress workers then gheraoed C Division where Ashwani Kumar was taken. An old man, Kashmiri Lal who had levelled serious charges against Baxi Ram Arora, former chairman of the Improvement Trust, was thrashed by BJP workers on Lawrence Road. The ruling party leaders did not spare even crew of electronic media.

The local administration had allegedly failed to stop armed outsiders from entering the city.

Panic gripped ward number 5 when some workers of the ruling party opened fire. In the melee that ensued, somebody carried away the electronic voting machine (EVM) from polling booth no 4, in Gumtala village where polling was subsequently postponed.

The clashes between Congress and Akali workers in this ward left over a dozen persons injured. Workers of both parties also pelted stones on each other and polling staff and voters had to take shelter in the rooms. The clashes resulted in the suspension of polling at booth numbers 4, 5 and 6 for more than an hour. Agitated voters later burnt the furniture of the polling station. Senior Akali leader Manjit Singh Manna and SHO Sadar also exchanged hot words (Walia, V. & Mohan, V. 2007, ‘Violence mars MC elections: Mayor among 36 hurt in Amritsar violence’, *The Tribune*, 8 August <http://www.tribuneindia.com/2007/20070809/punjab1.htm#1> – Accessed 7 March 2008).

²² Singh, K. 2007 ‘Dera row: History repeats itself’, *The Times of India*, 18 May <http://timesofindia.indiatimes.com/articleshow/msid-2060379,prtpage-1.cms> - Accessed 26 November 2009

²³ ‘Congress demands imposition of President's rule in Punjab’ 2010, *The Economic Times*, 16 May <http://economictimes.indiatimes.com/articleshow/3047226.cms> – Accessed 30 June 2010

²⁴ ‘1 dead, 12 hurt in Ludhiana clashes’ 2009, *India Today*, 5 December <http://indiatoday.intoday.in/site/Story/73709/LATEST%20HEADLINES/1+dead,+12+hurt+in+Ludhiana+clashes.html> – Accessed 30 June 2010

34. An article dated 30 June 2008 reports that there were widespread clashes, mainly between Akali and Congress, during recent local government elections ('Akali-BJP combine claims victory in violence marred civic polls' 2008, *Thaindian News*, 30 June http://www.thaindian.com/newsportal/politics/akali-bjp-combine-claims-victory-in-violence-marred-civic-polls-lead_10066328.html – Accessed 4 July 2008).

35. Reporting on the May 2008 local elections, *World Sikh News* refers to several incidents of clashes between supporters/members of the Akali groups and the Congress party under the heading of 'Danda Raj in Punjab: Local polls soaked in blood' as follows:

The clash took place between SAD and Congress candidates from the Doomchheri Zone of the Morinda Panchayat Samiti, along with their supporters, at a polling station at Doomchheri village this morning... Trouble reportedly started when a woman sought the assistance of polling staff and agents for casting her vote. The SAD polling agent reportedly guided her, which was objected to by Congress candidate Tarlochan Singh and his supporters. Thereafter, Tarlochan Singh and SAD candidate Harminder Singh Dimpi, accompanied by their supporters, clashed with each other and exchanged blows...

In another incident, Akali supporters allegedly fired at a Congress candidate in fray at Yogi Cheema in Gurdaspur district. Sukhdev Singh escaped with injuries...

In another clash between Akali and Congress supporters at Fatehgarh Korotona, Akali worker Gursewak Singh was injured after Congress Sarpanch Jaswinder Singh opened fire at him with a pistol. Gursewak has been referred to Ludhiana in a serious condition...

RIGGING AND violence marred the Zila Parishad and block samiti elections in Muktsar, Gidderbaha and Malout areas too. At least 15 Congress workers and three Shiromani Akali Dal loyalists were injured in clashes at villages in the three blocks ('Danda Raj in Punjab: Local polls soaked in blood' 2008, *World Sikh News*, 14 May

<http://www.worldsikhnews.com/14%20May%202008/Danda%20Raj%20in%20Punjab%20Local%20rn%20polls%20soaked%20in%20blood.htm?1=YES> - Accessed 18 June 2008).

36. In connection with the 2007 assembly election, *India eNews* comments that:

Turbans went flying Tuesday morning at Badal village in Punjab's Lambi assembly seat, the political home turf of former chief minister Parkash Singh Badal, as ruling Congress and opposition Shiromani Akali Dal workers clashed at a polling booth during voting for the state assembly elections ('Akali-Congress workers clash as voting picks up in Punjab' 2007, *India eNews*, 13 February

<http://www.indiaenews.com/print/?id=39310> - Accessed 18 June 2008).

37. Commenting on the March 2007 election, *The Tribune* states that:

The election was postponed due to violence between supporters of Congress and SAD that led to the killing of one Akali supporter on January 29 (Walia, V. & Bumbroo, S. 2007, 'Dimpa's bail plea gone; campaign on', *The Tribune*, 7 March

<http://www.tribuneindia.com/2007/20070307/punjab1.htm> – Accessed 7 March 2008).

38. Referring to the 2007 municipal council election, *The Tribune* similarly notes that:

Panic gripped ward number 5 when some workers of the ruling party opened fire...The clashes between Congress and Akali workers in this ward left over a dozen persons injured. Workers of both parties also pelted stones on each other and polling staff and voters had to take shelter in the rooms. The clashes resulted in the suspension of polling at booth numbers 4, 5 and 6 for more than an hour (Walia, V. & Mohan, V. 2007, 'Violence mars MC elections: Mayor among 36 hurt in Amritsar violence', *The Tribune*, 8 August <http://www.tribuneindia.com/2007/20070809/punjab1.htm#1> – Accessed 7 March 2008).

39. A recent dispute between the BJP and its alliance partner SAD has seen Congress come out in support of the BJP. During the aforementioned June 2010 dispute over the SAD's neglect of the BJP's urban constituencies in favour of its own rural support base, Congress called upon the BJP to withdraw support from SAD.²⁵

Relocation

40. Freedom of movement is guaranteed under Indian law. The government generally respects this in practice. The government repealed the previous requirement for nationals and foreigners to apply for special permits in order to travel to Manipur, Mizoram and Nagaland in 2010; however the requirement remains in force for travel to Jammu and Kashmir.²⁶ The UK Home Office reported that background checks by the Indian police are not conducted where Indian nationals relocate within India, as the authorities have neither the resources nor the language abilities to monitor internal relocation. There is no national registration system for Indian citizens, although it is common for Indian nationals to carry identity cards. These are reportedly easy to forge.²⁷
41. Linguistic demography may restrict the capacity of the applicant to relocate within India. Hindi is the majority language in the following northern states: Himachal Pradesh, Haryana, Delhi, Uttaranchal, Uttar Pradesh, Rajasthan, Madhya Pradesh, Bihar, Jharkhand and Chhattisgarh. Hindi is the official language of eight of the nine states listed above.²⁸ Hindi is also spoken in Punjab, and is understood by approximately 40 per cent of the Indian population.²⁹ According to the Encyclopaedia Britannica Online, Hindi is spoken as a first language by approximately 425 million people across India and as a second language by an additional 120 million.³⁰ Minority Rights Group noted that the majority of Muslims in Northern India speak Urdu.³¹ English is recognised as an "associate" official language to Hindi, and is used

²⁵ 'Punjab Congress MLA asks BJP to withdraw support from SAD' 2010, *Punjab News Line*, 23 June

²⁶ US Department of State 2011, *Country Reports on Human Rights Practices for 2010 – India*, April, Section 2.d

²⁷ UK Home Office 2010, *Country of Origin Information Report – India*, 21 September, p. 95

²⁸ University of Illinois at Urbana-Champaign – Linguistics Department (n.d.), *A Brief Profile of the Hindi Language*

<http://hindi.linguistics.illinois.edu/documents/ABRIEFPROFILEOFTHEHINDILANGUAGE_000.pdf> Accessed 4 October 2011

²⁹ Online Computer Library Center (n.d.), *Languages of India*

<<http://www.oclc.org/languagesets/educational/languages/india.htm>> Accessed 7 February 2008

³⁰ Encyclopedia Britannica Online (n.d.), *Hindi language*

<<http://www.britannica.com/EBchecked/topic/266241/Hindi-language>> Accessed 4 October 2011

³¹ Minority Rights Group International 2008, 'India – Muslims', Minority Rights Group International website, December <<http://www.minorityrights.org/5653/india/muslims.html>> Accessed 12 August 2011

predominantly by educated and professional groups, the media, and in administrative contexts.³²

42. A recent UK Home Office operational guidance note indicates that “Punjabi Sikhs are able to relocate to another part of India and there are Sikh communities all over India. Citizens are not required to register their faith in India and Sikhs are able to practise their religion without restriction in every state of India.”³³ Similar information was provided in an earlier April 2008 UK Home Office operational guidance note³⁴ Information in a 2006 Immigration and Refugee Board of Canada report indicates that the majority of Sikhs in India reside in Punjab state, but there are Sikhs located in every state in India.³⁵ According to the Indian government’s census website, the Sikh population in Punjab along with smaller Sikh populations in the states and territories of Chandigarh, Delhi, Haryana, Jammu and Kashmir and Uttaranchal make up nearly 90% of the Sikh population in India.³⁶
43. In relation to employment, the 2006 IRBC report indicates that:
- Upon relocation to an area in India outside of Punjab state, several sources commented Sikhs would have indiscriminate access to employment (Professor of Asian Studies 14 Nov. 2005; PUCL 30 Oct. 2005; Lawyer 27 Oct. 2005), although this would depend on their skills level (Associate Professor of Social and Cultural Anthropology 3 Nov. 2005). A specialist in Indian affairs commented that although Sikhs are employed in the government, the police, universities, government corporations and the business community, “there may be isolated instances where an individual feels discriminated against [in searching for employment], and in local communities there are tendencies for firms to employ locally-born and educated people” (Specialist on Indian Affairs 23 Nov. 2005).³⁷
44. The Times of India reported on 23 June 2013 that the overall Indian unemployment rate was 3%; 2% for men, and 5% for women³⁸. By contrast, the Australian Bureau of Statistics has Australia’s unemployment rate at 5.5% for May 2013³⁹ On 30 April 2013

³² Online Computer Library Center (n.d.), *Languages of India*

<<http://www.oclc.org/languagesets/educational/languages/india.htm>> Accessed 7 February 2008

³³ UK Home Office 2012, *Operational Guidance Note – India*, June, p. 9

<<http://ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/india.pdf?view=Binary>> Accessed 27 June 2012

³⁴ UK Home Office 2008, *Operational Guidance Note – India*, April, p. 8

³⁵ Immigration and Refugee Board of Canada 2006, *India: Ability of Sikhs to relocate within India; issues to be considered when relocating; safety concerns; treatment by authorities (March 2005 - December 2005)*,

IND100771.EX, 18 January <http://www.irb-cisr.gc.ca/en/research/publications/index_e.htm?docid=296&cid=0> Accessed 4 October 2006

³⁶ Immigration and Refugee Board of Canada 2012, *India: Treatment of Sikhs in Punjab (2007-February 2012)*, IND103968.E, 2 May <http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=453967&l=e> Accessed 31 May 2012

³⁷ Immigration and Refugee Board of Canada 2006, *India: Ability of Sikhs to relocate within India; issues to be considered when relocating; safety concerns; treatment by authorities (March 2005 - December 2005)*,

IND100771.EX, 18 January <http://www.irb-cisr.gc.ca/en/research/publications/index_e.htm?docid=296&cid=0> Accessed 4 October 2006

³⁸ <http://timesofindia.indiatimes.com/india/Unemployment-rate-increases-in-India/articleshow/20730480.cms> - accessed 24 June 2013.

³⁹

<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6202.0Main%20Features2May%202013?opendocument&tabname=Summary&prodno=6202.0&issue=May%202013&num=&view=-> accessed 24 June 2013.

the World Bank issued a report in which it expected economic growth in India to accelerate to over 6% up to March 2014, and to 6.7% in 2015, and concluded that long-term prospects remain bright⁴⁰.

RRT-reviewable decision

45. The Tribunal finds that the delegate's decision is an RRT-reviewable decision within the meaning given to that term in s.411 of the Act, that the applicant has made a valid application for review of the delegate's decision under s.412 of the Act, and that the Tribunal has jurisdiction to review the decision.

Country of reference

46. The Tribunal finds that the applicant is a national of India. There is no evidence before the Tribunal that he is a national of any other country, and the Tribunal finds that he is not. For the purposes of assessing his refugee claim, the Tribunal finds that India is his country of reference. The Tribunal finds that for the purposes of assessing his claims against s.36(2)(aa), if he were removed from Australia, the receiving country to where he would be removed to is India.
47. There is no evidence before the Tribunal that he has a right to enter and reside in any country other than India, and the Tribunal finds that he cannot.

Hearing preliminaries

48. At the outset of the hearing, the applicant was given an introduction to the role and function of the Tribunal. The following were explained to him:
- a. The refugee criterion and its main components, including the concepts of 'real chance', 'serious harm', and the five Convention-grounds.
 - b. The complementary protection criterion and its main components, including the concept of 'real risk' and the definition of significant harm.
 - c. That to remain eligible for the visa, an applicant needed only to satisfy one of the two above criteria.
 - d. That the Department had decided that neither of the two criteria were met, and that is why it refused to grant the visa.
 - e. The Tribunal was required to provide applicants with a 'private' hearing.
 - f. Part of the Tribunal's role is to assess the credibility of an applicant's written and oral evidence, and the evidence of any witnesses.
 - g. There are occasions where the Tribunal finds that evidence provided has not been truthful or reliable and this has affected the Tribunal's assessment of the credibility of that evidence, and in cases, the outcome of the application.

⁴⁰ <http://www.worldbank.org/en/news/press-release/2013/04/30/despite-downturn-long-term-growth-india-prospects-bright>- accessed 24 June 2013.

- h. It is therefore very important that evidence given be truthful, and as clear and detailed as possible.

Convention-nexus

49. The delegate decided that the applicant's claims did not engage any of the five Convention-reasons.
50. The written claim in his application forms is superficial, vague and lacks detail. As written, the applicant claims that his family were in a political dispute with persons from an unknown political party, he had been attacked twice as a consequence, and threats continue to be made against him.
51. The delegate's decision reveals that his claims have since altered. I deal with that below.
52. Taken on their face, he claims that he and his mother were and are in a dispute with his paternal uncle over property owned wholly or partly by his father and/or his paternal grandfather – both of whom he claimed were deceased. The political aspect of these claims is that his uncle supports or is a member of the Akali Dal, and he is a member or supporter of Congress. Country information confirms the Akali Dal is in power in the Punjab and that Congress is a political rival.
53. His claim, as most recently expressed, is that his uncle has used connections with the Akali Dal to intimidate him. He claims that this political component of his claim engages the Convention.
54. His claim, at face value, strongly suggests that if he accedes to his uncle's demand in relation to the property dispute, there would no longer be a dispute. It strongly suggests that his uncle wishes to secure the property of his grandfather and/or father which is the subject of the dispute. It strongly suggests that if his uncle has used any connections with a party or the authorities to intimidate him, or to perpetrate the claimed attacks on him, these are designed to persuade him that he should not continue to dispute his uncle's claims to the property. All of these considerations suggest that the essential and significant reason his uncle wishes him harm, if that were found to be true, is because he seeks gain from securing property which the applicant also wishes to secure. For these reasons, I agree with the delegate's expressed reasons, in finding that his uncle's motivation for wanting the property, and his motivation for taking action against the applicant, are personal and involving self-enrichment and are do not engage any of the Convention-grounds.
55. I note that on the evidence, his uncle appeared to have no issue with him until the property in question came into dispute. This again suggests that obtaining undisputed ownership of the property is his uncle's driving motivation and that there is no underlying political motivation on the part of his uncle which supplants his interest in obtaining the property as the essential and significant reason for his actions against the applicant.
56. I note that I have undertaken this analysis accepting the applicant's claims to the delegate at face value and without making any adverse factual or credibility findings against him.
57. For the above reasons, I find the applicant cannot meet the refugee criterion.

58. I find further and separately that he does not meet the refugee criterion because, for the reasons below, I reject his claims as not reliable and not credible, and find there is no real chance of serious harm to him in any place in India.
59. For the above reasons, I find his claimed fear of persecution not to be well-founded.

Complementary protection

Inconsistency between written claims and statements noted by delegate

60. The following material discrepancies or inconsistencies are noted between the applicant's written application and his statements to the delegate as noted in the delegate's decision – both summarised above:
 - a. He indicated that his father and mother both reside, at the time of application, in India; he claimed to the delegate that his father died in [the late 1980s] which led to a dispute over his father's property between his mother and his uncle;
 - b. He made a superficial and vague claim to be involved in a political dispute with persons from an unnamed political party in his written application; (as discussed above) he made, for the first time to the delegate, a claim to be involved in a dispute over property with his paternal uncle who he claimed was of the Akali Dal;
61. The delegate's decision reveals that the land or property dispute with his uncle was a central feature of his claim to the delegate. He also clearly attempted to couch that dispute as one polarised by the disputants being from opposing political parties. Country information makes clear that the Akali Dal and Congress are prominent and opposed political parties in the Punjab.
62. The delegate's decision notes that he claims to have come to Australia in 2009 out of a fear of harm from his uncle. There is no apparent reason why, if his claims regarding the property dispute, his uncle's support of the Akali Dal, and his own support of Congress, were all central features of a claim, which on his evidence dates back to before he came to Australia, that he would not have mentioned these features in his written application; features which he pressed and relied upon to the delegate.
63. The fact that he did not suggests that the applicant has changed the fabric of his claim between lodging his application and discussing his application with the delegate. That conclusion is supported by the observation that he indicated his father was alive and resident in India in his application, and then to the delegate relied on his father's death in [the late 1980s] to explain a property dispute between his mother and uncle which preceded his own dispute with his uncle.
64. I find that there is a material change in the fabric of the applicant's claim to be at risk of harm as between the two points in time that he has provided claims in this application, and material discrepancies in the claimed facts he relies upon.

Delay in seeking protection

65. The delegate's decision notes that the applicant arrived in Australia on a student visa in 2009 and that he claims to have fled to Australia because he feared harm from his uncle. On the evidence, he did not raise any claim to need protection from harm in India until September 2012, after having been an unlawful non-citizen for more than a year. His migration history suggests that he came to Australia to study, was not sufficiently concerned about return to India to rectify his unlawful status in more than a year, and applied for protection out of a desire to remain in Australia unconnected with a need for protection at a time when, due to his unlawful status, he had few other visa options remaining.
66. These considerations cause me to have further doubt as to the credibility of the applicant's claims to be in need of protection.

Conclusion

67. For all of the above reasons, I am unable to be satisfied that either set of claims put by the applicant are credible or reliable, and I reject both sets of claims he has made to face harm in India.
68. Apart from the claims already rejected, the applicant makes no additional claim to be at risk of harm in India, and I find that there is no real risk of harm, let alone significant harm, to him in India, and for that reason he does not satisfy the criterion contained in s.36(2)(aa).

CONCLUSIONS

69. The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
70. The Tribunal has considered the alternative criterion contained in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under s.36(2)(aa).
71. 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) by virtue of ss. 36(2)(b) or (c).

DECISION

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

Adrian Ho
Member