

1414739 (Refugee) [2015] AATA 3690 (16 November 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1414739
COUNTRY OF REFERENCE:	Bangladesh
MEMBER:	Chris Thwaites
DATE:	16 November 2015
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 16 November 2015 at 3:01pm

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

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection visa under s.65 of the *Migration Act 1958* (the Act)¹.
2. The applicant, who claims to be a citizen of Bangladesh, applied for the visa [in] June 2013 and the delegate refused to grant the visa [in] August 2014.

CONSIDERATION OF CLAIMS AND EVIDENCE

3. The Tribunal has before it the Department's file relating to the applicant's protection visa application and the Tribunal's file relating to the review application. The Tribunal has also had consideration of the delegate's decision record provided to the Tribunal by the applicant.
4. The applicant's written claims for protection are contained in a statutory declaration dated [in] June 2013 provided to the Department as an attachment to his visa application forms. In summary the applicant claims that he was born [on date] in [his home village] in Bangladesh, and is a Bangladesh citizen. The applicant declares he fears returning to Bangladesh. He left Bangladesh because of his imputed political opinion as a person who did not comply with the demands of the most influential political party in Bangladesh. The applicant declares he was harassed and intimidated and forced to pay money in the form of a donation to supporters of the Bangladesh Awami League Party (ALP). When he refused to comply with the demands his life was in danger because they threatened to kill him. The applicant declares the ALP is a powerful political party in Bangladesh, who are currently in power and rule over Bangladesh. The applicant declares their supporters are everywhere in Bangladesh and since they have come to power, they want to remain in power and in order to do so they need financial support. To maintain this financial support they intimidate people and businesses and demand donations from them.
5. The applicant declares that one day while working in his shop the supporters of the ALP demanded that he pay donations to the party. When the applicant refused to pay any money the men verbally abused him and threatened to destroy his shop if he did not pay the money. The men then left and returned in a larger group about two or three hours later. They then destroyed the applicant's shop by dropping all of the products. All the applicant's goods were destroyed and they even destroyed the structure of the shop which was made of [building material]. The applicant immediately went to his father and informed him of the incident. The applicant's father then went to the police station to make a complaint, and was told by the police officers that they cannot accept this case. They asked the applicant's father to leave. The applicant declares his father immediately knew why the police could not take the case, the police did not provide any reasons but it was obvious that it was because the ALP supporters were involved. When the police did not respond to the complaint the applicant's family suggested that it would be safer if the applicant did not stay at home. They suggested he hide at his [relative's] place.
6. While the applicant was residing at his [relative's] place, the ALP supporters discovered they had tried to complain to the police, and came to his home to threaten him. The ALP supporters were furious that they had complained to police. The applicant's mother was at home when they came to the house. The supporters demanded to see the applicant. The applicant's mother told them he was not at home. The applicant suspects they came to his home because his father had complained to the police. They appeared to be very angry and

¹ The relevant law is attached to this Statement of Decision and Reasons.

threatened that since the applicant had not paid them the money, they would find him and would kill him. The applicant believes that they were more furious because his father had gone to the police station. When they threatened to kill the applicant he decided to leave Bangladesh. He knew that they were able to find him and kill him. His father had connections and they arranged for the applicant to leave Bangladesh for Australia. The applicant left Bangladesh immediately to prevent any attempt to find him and harm him.

7. The applicant declares that he believes if he returns to Bangladesh he would face a real chance of being harmed or killed by the supporters of the ALP. He believes that they are capable of doing so and will not hesitate to kill him if they find him. The ALP is a powerful party and their supporters are able to do anything they wish without any consequences for their actions. They are currently in power and they rule over Bangladesh. The applicant fears that they are able to harm him and he cannot seek the protection of the authorities. He believes that if he returns to Bangladesh he would be at a real risk of facing serious harm by the currently ruling supporters of the ALP. The applicant declares that if he returns to Bangladesh he will be captured and tortured and killed by supporters of the ALP. He is sure of this because they are capable of doing so, and they have the means to get away with it. They are able to harm people without facing any consequences for their actions. The applicant declares that he has defied the demands of the ALP supporters and has refused to pay them money. Furthermore he tried to complain to the authorities against the wishes of the group. He believes that he has angered them by not complying with their demands and also trying to undermine them by complaining. He believes that his life is in danger because of this.
8. The applicant declares that the authorities in Bangladesh will not protect him because the authorities essentially work for the Awami League people. The Awami League is in the government at the moment and the government pays the salaries. The government is their boss. The applicant tried to seek protection from the authorities but the authorities could not help him. He also believes that they informed the Awami League people when he tried to complain. The applicant declares that no one in Bangladesh is able to protect him. The applicant also declares that he cannot relocate because the ALP rule all over Bangladesh. They control everything everywhere in Bangladesh, and they will be able to find him where ever he goes. He does not have any safe place in Bangladesh to flee. The applicant believes that relocating anywhere in Bangladesh is impossible because the authorities will be able to find him. He has no place in Bangladesh to relocate.
9. The delegate's decision record indicates the applicant was interviewed by the delegate [in] August 2014. The decision record indicates that during that interview the applicant told the delegate that he believes he was asked to give money to the ALP members because he ran a shop, and because his brothers worked for the BNP.
10. [In] August 2014 the delegate refused to grant the applicant a protection visa because the delegate did not accept the applicant was a credible witness. According to the decision record, on several occasions during the interview the applicant would not directly answer basic questions asked to him, and would deny any inconsistencies put to him for comment. Furthermore, the applicant's internally inconsistent accounts of events that led him to leave Bangladesh created further doubt the applicant was a witness of truth. The delegate found the applicant was not a witness of truth with regard to his claims for protection and concluded the applicant has fabricated his claims. The delegate rejected the applicant's material claims and was not satisfied the applicant had a real chance of being persecuted for a Refugee Convention reason, and therefore was not satisfied the applicant's fear was well founded. The delegate was not satisfied Australia had protection obligations to the applicant under the Refugees Convention and as a result the applicant did not meet criterion for the grant of the protection visa under s.36(2)(a). The delegate was also not satisfied that there were substantial grounds for believing that, as a necessary and foreseeable consequence of

the applicant being removed from Australia to Bangladesh, there was a real risk the applicant would be subject to significant harm, therefore the delegate was not satisfied Australia had protection obligations to the applicant under s.36(2)(aa). Accordingly, the delegate was not satisfied the applicant was a person in respect of whom Australia has protection obligations under s.36 of the Act, and refused to grant the applicant a protection visa.

11. On 29 August 2014 the applicant applied to the Tribunal for review of that decision.
12. The applicant appeared before the Tribunal on 29 October 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Bengali and English languages.
13. During the hearing the applicant told the Tribunal that his statutory declaration had been read back to him through an interpreter at the time he signed the document and that he did not wish to make any changes or add anything to that document.
14. During the hearing the applicant told the Tribunal he feared returning to Bangladesh as he had been threatened by hooligans belonging to the Awami League, Awami League terrorist, because he refused their demands to pay them money. He told the Tribunal he thinks that they will get a hold of him and will kill him if he returns to Bangladesh.

FINDINGS AND REASONS

Nationality

15. On the basis of the applicant's consistent information provided to the Department and the Tribunal about his place of birth and citizenship of Bangladesh, the Tribunal finds that the applicant is a citizen of Bangladesh. There is nothing in the evidence before the Tribunal to suggest that the applicant has a right to enter and reside in any country other than Bangladesh. Therefore the Tribunal finds that the applicant is not excluded from Australia's protection by subsection 36(3) of the Act. As the Tribunal has found that the applicant is a national of Bangladesh, the Tribunal also finds that Bangladesh is the applicant's "receiving country" for the purposes of s.36(2)(aa).

Credibility

16. During the hearing the Tribunal discussed with the applicant his background, education, family composition, and employment in Bangladesh, as well as the reasons he left Bangladesh and his fears of returning. The Tribunal noted a number of differences between the applicant's oral evidence and his statutory declaration, as well as differences between the applicant's oral evidence and the information he provided to the delegate during his interview, as recorded in the delegate's decision record, as well as differences between the applicant's oral evidence and the information provided in his visa application forms. The Tribunal raised a number of concerns it had with the applicant's oral evidence and whether the applicant was telling the Tribunal the truth in relation to critical aspects of his claims. The Tribunal finds the applicant is not a witness of truth and it is not satisfied the applicant has told the truth in relation to critical aspects of his claims. The reasons for these findings are discussed below.
17. During the hearing the Tribunal raised its concerns about the differences between the applicant's oral evidence and his statutory declaration.
18. During the hearing the applicant told the Tribunal that he and his brother had run a [shop] near their family home in Bangladesh for a number of years. He told the Tribunal that about

a month before the applicant left Bangladesh, 10 or 12 hooligans belonging to the Awami League, Awami League terrorists, entered his shop and said that if he wished to have a shop he had to pay them 50,000 Taka, and if he doesn't pay he cannot run the business. The applicant refused to pay the money and they threatened him, telling him if he does not pay up they will kill him and smash his shop. The applicant then told the Tribunal at that point they left, and three or four hours later they returned and smashed the shop. The applicant told the Tribunal he was not in the shop when they returned; his brother was there, and his brother had run for it at that time.

19. The applicant told the Tribunal he found out that the people had returned and smashed the shop through a neighbour, who told him they were breaking up the shop and were looking for the applicant. His neighbour knew this because they were asking about the applicant.
20. On further questioning about what the applicant did after the people had initially come to the shop and demanded money and left, the applicant told the Tribunal his brother then came to the shop, and the applicant handed over to him, and the applicant then went home. The applicant did not tell his brother about what had happened. When asked if the applicant did anything when he went home, the applicant told the Tribunal he did not do anything when he went back home because he thought that they had left, and the next thing was he heard from his neighbour that they were smashing the shop. The applicant told the Tribunal that when the applicant heard from his neighbour they were smashing the shop and looking for him, he decided to leave his home and went to [a relative's] house in another village.
21. The Tribunal raised its concern that the applicant's oral evidence was different to his statutory declaration. The Tribunal noted the applicant's statutory declaration states:

One day while I was working at my shop, the supporters of the ALP came over and demanded that I pay donations to the party. I refused to pay them any money. The men then verbally abused me and threatened that they will destroy my shop if I did not pay them money.

The men then left and returned in a larger group about two to three hours later. They then destroyed my shop by dropping all the products on the shop. All my goods were destroyed. They even destroyed the structure of the shop which was made of [building material].

I then immediately went to my father and informed him of the incident. My father then went to the police station to make a complaint against the authorities. He was told by the police officers that they cannot accept this case. They also asked my father to leave.

My father immediately knew what the police could not take on the case. The police did not provide any reasons but it was obvious because the ALP supporters were involved.

When the police did not respond to the complaint, my family suggested to me that it would be safer if I did not stay at home. They suggested that I hide at my [relative's] place.

22. The Tribunal raised its concern that the applicant had not mentioned in his oral evidence about speaking to his father about the incident, or that his father had approached the police to make a complaint.
23. In response the applicant told the Tribunal the matter about reporting to the police was true, however it did not come up today and he forgot to mention it.

24. The Tribunal also raised its concerns that the applicant had told the Tribunal that once his neighbour had told him they were smashing the shop and looking for him, he decided to leave his home and went to his [relative's] house, yet his statutory declaration indicates the applicant hid at [another relative's] house.
25. In response the applicant told the Tribunal his [relative's] house and [the other relative's] house are quite close to each other and that could be the reason why the confusion arose.
26. The Tribunal also noted the applicant had told the Tribunal that on the same day as the shop incident, the people then went to his family home and asked his mother where the applicant was, and when they were told the applicant was not a home, they threatened if they get hold of the applicant they will kill him, and then they left. On questioning why they would do this, the applicant told the Tribunal it was because he would not pay them the money they demanded.
27. The Tribunal noted that the applicant's statutory declaration mentions the attempt to make a complaint to the police a number of times, and also indicates the applicant believed this contributed to their anger against him. The statutory declaration states the applicant believes they were more furious because he had gone to the police station. It also states the applicant was threatened that he would be killed when he tried to complain to the police, and that he had tried to complain against them by going to the police and believes that they have been further angered by his actions. The statutory declaration states the applicant believes that he angered them by not complying with their demands, but also trying to undermine them by complaining. The statutory declaration also states the applicant tried to seek the protection of the authorities but the authorities could not help him
28. In response to the Tribunal's further concerns that the applicant had failed to mention the attempt to complain to the police, or that such an attempt may have also been a reason why these people wished to find and harm the applicant, the applicant told the Tribunal it is true that his father's attempt to complain to the police aggravated them more.
29. While the Tribunal has considered the applicant's responses to its concerns, including that he forgot to mention the attempted police complaint, the Tribunal notes the applicant was asked a number of times about his actions on the day of the shop incident, and about the reasons why the ALP people wished to find him and harm him. The Tribunal also notes the attempted police complaint features prominently in the applicant's statutory declaration as part of the reason why these people were angry and searching for the applicant. While the Tribunal accepts that the stress of giving evidence and the passage of time can affect a person's ability to recall detail, the Tribunal notes the applicant's statutory declaration is dated [in] June 2013 and makes claims in relation to incidents that occurred earlier 2013. The Tribunal would expect someone who had experienced the incidents set out in the applicant's statutory declaration to have recalled the attempted police complaint. The Tribunal considers the applicant's failure to mention this in his initial oral evidence reflects poorly on his credibility and on the reliability of his claims. The Tribunal is also not persuaded that because the applicant's [other relative's] home is close to his [relative's] home, that explains the difference between his oral evidence and his statutory declaration in relation to where he went when he decided to leave his home. The Tribunal considers this difference reflects poorly on the applicant's credibility and on the reliability of his evidence.
30. During the hearing the Tribunal also raised its concerns that the applicant's oral evidence was different to the information he provided to the delegate during their interview [in] August 2014, as recorded in the delegate's decision record.
31. The Tribunal noted that the decision record indicates the applicant told the delegate that after the applicant refused to pay the 50,000 Taka, his father complained at the local police

station, and following this the applicant's shop was destroyed. The decision record notes the applicant claims the police did not investigate the complaint and that the applicant hid at his [relative's] house. In response the applicant told the Tribunal that what he had told the delegate was true, but that he did not come up today so that is why he did not mention it.

32. The Tribunal noted that the decision record also indicates the applicant told the delegate that he believes he was asked for the money because he ran the shop, and because his brothers worked for the BNP. The Tribunal noted that earlier in the hearing, when asked why the ALP people had approached him for money, the applicant had told the Tribunal it was because he ran the shop. The Tribunal raised its concerns that the applicant had failed to mention in his oral evidence that his brothers worked for the BNP, and that that was also a reason why he was approached for money.
33. In response the applicant told the Tribunal that [a number] of his brothers are BNP supporters and one of the reasons why they are living in their in-laws homes is because they fear for their own lives. The Tribunal accepts the applicant had earlier told the Tribunal that [a number] of his brothers lived away from his parents' home, with their in-laws, in other villages. On further questioning about why the applicant's brothers fear for their lives, the applicant told the Tribunal the fact that they are BNP supporters is the reasons why the Awami thugs have threatened them on different occasions as well, and they felt unsafe and left the family home. When asked how his brothers' support the BNP the applicant told the Tribunal they mingle with the BNP leaders and Chairman. The applicant told the Tribunal that when the Awami League came to power they began to threaten people from other parties and that is when his brother's felt they were not safe anymore and that is when they decided to leave. The applicant could not recall when the Awami League came to power. He told the Tribunal his brothers were friendly with the local [BNP] Chairman and helped him out. The applicant was unable to recall the Chairman's name, and told the Tribunal he was called [name]. The Tribunal noted the applicant had earlier told the Tribunal his [brothers] had been living away from his family home, with their in-laws, for about three or four years. The applicant told the Tribunal that when the Awami League came to power, he and all his brothers were still living at the family home, but when the Awami League came to power that is when the problems started so his brothers decided to leave the family home and then soon after the applicant left. The Tribunal noted that country information indicated that the Awami League came to power in Bangladesh in the general elections in December 2008². The applicant confirmed that is when the things started to go wrong and they began to cause trouble to others, and his brothers left the family home about the same time as the applicant left. The Tribunal noted the applicant had changed his oral evidence, that he had told the Tribunal his brothers had left the family home soon after the Awami League came to power, and then told the Tribunal that his brothers had left the family home about the same time as the applicant left. The Tribunal notes the applicant had told the Tribunal that he had left his family home in early 2013. The Tribunal also noted the applicant had earlier told the Tribunal that his brothers had left the family home three or four years ago. In response the applicant told the Tribunal that the Awami League is still in power and continues to make trouble, and that they did not do everything as soon as they came to power.
34. The Tribunal also raised its concerns that the applicant's visa application forms indicate the brothers the applicant had identified as BNP supporters, who lived away from the family home and with their in-laws in other villages, lived in [his home] village, which is the applicant's family village. The forms give the same general address for the applicant's mother and father and [a number] of his brothers (including the brothers identified by the applicant as the BNP supporters). The forms note [other] brothers live in [another country], and the applicant's sister lives in [another town in] Bangladesh. In response the applicant told the Tribunal that his brothers were at [his home village] but they left later. The Tribunal

² Department of Foreign Affairs and Trade (DFAT) Country Report Bangladesh 20 October 2014

notes the visa application forms were lodged with the Department [in] June 2013, and indicated that his brother lived at [this village] at that time, which was different to his oral evidence. In response the applicant told the Tribunal they left later. When asked when they left the applicant was unable to remember the dates.

35. During the hearing the Tribunal also raised its concerns that the delegate's decision record indicates the applicant changed the information he provided to the delegate during his interview in relation to when events happened, and the order the events happened in. The Tribunal noted the delegate's concern that the applicant had provided different times for when his shop was destroyed. Initially he told the delegate his shop was destroyed two to three days after the members of the ALP first came to his shop, then he stated it happened four to five hours after his father had reported the initial threat to the police, then he told the delegate it all happened on the same day. The Tribunal also noted the information in the delegate's decision record is different to the applicant's statutory declaration which indicates the applicant's shop was destroyed before his father attempted to complain to the police.
36. In response the applicant told the Tribunal he had said what he had to say.
37. While the Tribunal accepts that people experiencing stressful situations can confuse the order of events, and in isolation, the Tribunal would not normally make adverse credibility findings based on that alone, given the other credibility concerns noted above, the Tribunal has concluded the applicant is only vaguely aware of the details of claims made in his statutory declaration. The applicant's oral evidence during the hearing was vague and changing in detail, it was different to his statutory declaration and his visa application forms in a number of critical aspects, and did not exhibit the depth of knowledge and consistency the Tribunal would expect of someone who had actually experienced the events claimed.

Refugee Convention

38. The Tribunal found the applicant's oral evidence to be different to his statutory declaration and his visa application forms in a number of aspects, and the Tribunal is concerned the applicant changed his oral evidence when questioned for more detail during the hearing. The Tribunal finds the applicant is not a witness of truth and it is not satisfied the applicant has told the Tribunal the truth in relation to critical aspects of his claims.
39. Given the credibility concerns discussed above the Tribunal does not accept the applicant was approached by supporters of the ALP while he was working in his shop and asked for 50,000 Taka, or any money or donation. The Tribunal does not accept the applicant refused to pay, or that he was then verbally abused and threatened that they would destroy his shop if he did not pay the money. The Tribunal does not accept that supporters of the ALP, or anyone, then destroyed the applicant's shop or the goods in his shop. The Tribunal does not accept the applicant told his father about this incident, or that the applicant's father attempted to make a complaint to the police. The Tribunal does not accept police officers refused to accept the complaint, or that the applicant was advised by his family that it would be safer for him to stay away from home. The Tribunal does not accept the applicant left his family home in fear for his safety and hid or resided in his [other relative's] home, or his [relative's] home. The Tribunal does not accept that supporters of the ALP visited the applicant's family home and spoke to his mother, asking to see the applicant, or asking where the applicant was, or that they then made threats that since the applicant had not paid them money they would find him and kill him.
40. The Tribunal does not accept [a number] of the applicant's brothers are supporters of the BNP, or that this was a reason why supporters of the ALP would approach the applicant for money. The Tribunal does not accept the applicant's brothers left the family home due to concerns about the actions of the Awami League government or the supporters of the ALP.

41. The Tribunal does not accept the applicant was in fear of harm when he left his family home, or when he left Bangladesh. The Tribunal does not accept the applicant was or is of any adverse interest to the supporters of the ALP, or anyone else, in Bangladesh.
42. The Tribunal does not accept there is a real chance the applicant's life will be in danger, or that he will be intimidated or threatened or beaten, or that he will be found, captured, tortured and killed by supporters of the ALP, or anyone else, if the applicant returned to Bangladesh, now or in the foreseeable future.
43. The Tribunal does not accept there is a real chance the applicant will suffer serious harm, or harm of any kind, if returned to Bangladesh, now or in the foreseeable future.
44. The Tribunal finds that the applicant is not a witness of truth and finds there is no real chance that the applicant will suffer serious harm if returned to Bangladesh, now or in the foreseeable future, and for these reasons the Tribunal finds the applicant does not have a well-founded fear of persecution.
45. Having considered the applicant's claims individually and cumulatively, for the reasons given above, the Tribunal is not satisfied the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

Complementary protection

46. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative complementary protection criterion in s.36(2)(aa).
47. The Tribunal finds the applicant is not a witness of truth and it is not satisfied the applicant has told the Tribunal the truth in relation to critical aspects of his claims.
48. For the reasons given above, the Tribunal does not accept the applicant was approached by supporters of the ALP while he was working in his shop and asked for 50,000 Taka, or any money or donation. The Tribunal does not accept the applicant refused to pay, or that he was then verbally abused and threatened that they would destroy his shop if he did not pay the money. The Tribunal does not accept that supporters of the ALP, or anyone, then destroyed his shop or the goods in his shop. The Tribunal does not accept the applicant told his father about this incident, or that the applicant's father attempted to make a complaint to the police. The Tribunal does not accept police officers refused to accept the complaint, or that the applicant was advised by his family that it would be safer for him to stay away from home. The Tribunal does not accept the applicant left his family home in fear for his safety and hid or resided in his [other relative's] home, or his [relative's] home. The Tribunal does not accept that supporters of the ALP visited the applicant's family home and spoke to his mother, asking to see the applicant, or asking where the applicant was, or that they then made threats that since the applicant had not paid them money they would find him and kill him.
49. The Tribunal does not accept [a number] of the applicant's brothers are supporters of the BNP, or that this was a reason why supporters of the ALP would approach the applicant for money. The Tribunal does not accept the applicant's brothers left the family home because they are supporters of the BNP or due to concerns about the actions of the Awami League government or the supporters of the ALP.
50. The Tribunal does not accept the applicant was in fear of harm when he left his family home, or when he left Bangladesh. The Tribunal does not accept the applicant was or is of any adverse interest to the supporters of the ALP, or anyone else, in Bangladesh. The Tribunal

finds that the applicant is not a witness of truth and the Tribunal is not satisfied there is a real risk the applicant will suffer significant harm for any of the reasons he has claimed, if he were returned to Bangladesh, now or in the reasonably foreseeable future.

51. Having considered the applicant's claims individually and cumulatively, for the reasons given above, the Tribunal is not satisfied there is a real risk the applicant will be arbitrarily deprived of his life; or the death penalty will be carried out on him; or that he will be subject to torture, or cruel or inhuman treatment or punishment; or subject to degrading treatment or punishment, if he is returned to Bangladesh, now or in the reasonably foreseeable future.
52. Accordingly, 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 Bangladesh, there is a real risk he will suffer significant harm. Therefore the applicant does not satisfy the criterion set out in s.36(2)(aa) for a protection visa.

CONCLUSION

53. 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)(a) or (aa) for a protection visa.
54. 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

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

Chris Thwaites
Member

16 November 2015

ATTACHMENT: RELEVANT LAW

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

Refugee criterion

57. 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).
58. 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.
59. 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.
60. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
61. 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.
62. 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.
63. 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.

64. 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.
65. 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.
66. 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

67. 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').
68. '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.
69. 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

70. 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.