

1217448 [2013] RRTA 545 (8 August 2013)

DECISION RECORD

RRT CASE NUMBER: 1217448

DIAC REFERENCE(S): CLF2012/138944

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Margret Holmes

DATE: 8 August 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 dependent.

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 and Citizenship (the Minister) 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 is a citizen of India, first arrived in Australia [in] July 2007. He was outside Australia from [August] 2008 to [January] 2009 and has been in Australia since his return. He applied to the Department of Immigration and Citizenship (the Department) for the protection visa on 4 July 2012 and the delegate refused to grant the visa on 8 October 2012. The applicant applied to the Tribunal for review of that decision on 9 November 2012.
3. After a postponement because the applicant had advised that he was not well, the applicant appeared before the Tribunal on 29 May 2013 to give evidence and present arguments.

WHY THE APPLICANT IS SEEKING PROTECTION IN AUSTRALIA

4. The applicant is a [age] year old man. He describes his religion as Gujar in the protection visa application but at the hearing explained that this was his caste, which is a low caste. The applicant states in his protection visa application that he came to Australia because he belongs to a 'minority group of caste' at risk of extinction.
5. The applicant states in the protection visa application that he lived in [a city] in Haryana before coming to Australia in 2007 and at the hearing explained that his father worked there as a manager in a [business], that his family came from [City 1] in Uttar Pradesh and that the family home was in [Town 2]. The applicant said that his father was known in the community
6. The applicant said that his [relative] sends him money from India. He said that his father, who had worked at the [business] for some [number] years, was soon to retire. The applicant said that he has older [siblings] [who] several years ago moved to live in Bangalore in the state of Karnataka. [Occupations deleted]. He said that they moved there because of issues in his home area. The applicant said that they were safe in Bangalore.
7. The Tribunal explored with the applicant the implications his caste had on his life in India. He said that the government had promised things but had not delivered. He said that in Uttar Pradesh the Samajwadi Party was in and out of power and had never given equal rights to Gujars who did not have a normal way of life. The applicant said there were regular protests.
8. The Tribunal asked what rights the applicant did not have and he talked about not being able to get into private schools and that he did not believe he had obtained a good quality education. The applicant stated in his protection visa application that he had attended [School 1] for the last period of his schooling and had gone to a missionary school before then. He said that [School 1] was a good school and he had been able to get in because his father had contacts on the board. The applicant said that Gujars did not get into higher learning on account of their caste. He said that he had sat entrance tests and that people with lower marks than he had were given admission.

9. The Tribunal said that it was aware that people from lower castes could face discrimination but that it did not seem to it that the applicant had been so affected. He referred to his father's high status managerial job and his father's contacts which he said these factors could lead him to be treated better than other Gujar people but with his father's imminent retirement, this could change.
10. The applicant states in the protection visa application that he was badly treated in India and was injured 'and was close to getting killed at one point' The applicant states that he was injured in the 2002 riots and was hospitalised for three months. He states that in 2006 he sustained head injuries and was again hospitalised in a serious condition. He states that he was badly treated by government officials. The applicant states that his family did not want to lose their only son and so they sent him to Australia.
11. At the Tribunal hearing the applicant said that it was in 2004, he said when he was [age], that he was beaten up, he said in [Town 2]. He said that this occurred when he and his father were helping a friend of his father who was standing for election to a local body. The applicant said that people associated with Samajwadi Party found out that the applicant and his father were supporting his father's friend and attacked them. The applicant said he was seriously hurt, sustaining a head injury, and that he spent six weeks in hospital. The Tribunal said that this episode did not appear to have been mentioned in his protection visa application and the applicant said that the documents about it were with his migration agent. The applicant said that this had been a one-off attack and was not followed by anything further.
12. The Tribunal asked if the applicant had been hurt or injured at any other time. He said that in 2006 he was with a friend, also Gujar and whose family was well-off. The applicant and his friend went to his friend's village for a family celebration. The applicant said that his friend had issues with some local people in his village and the applicant was dragged into that conflict and that it was related to caste conflict. The applicant said that his family and his friend's family each lodged a First Information Report (FIR) about the incident. The applicant said that he had been injured on his head and had been in hospital for two or three days. He said that his agent had a copy of the First Information Report. Later in the hearing, the applicant said that his leg was fractured when he was beaten with a rod in this attack.
13. The Tribunal asked if the applicant had been injured at any other time and he said he had been injured twice and he had described incidents in 2004 and 2006. The Tribunal said that in his protection visa application he had written of an incident in 2002 which, he had stated, led him to be hospitalised for three months. The applicant said he had been hospitalised then for three weeks, not for three months. He said he had been injured in 2002, 2004 and 2006. Then he said his head had been injured three or four times.
14. The applicant states in his protection visa application that he returned to India in August 2008 for some [months] because his father was injured. At the hearing the applicant said he had returned because his father was ill and hospitalised, not injured. In response to the Tribunal's question, the applicant confirmed that nothing had happened to him while he was there. When the Tribunal said that it seemed relevant that nothing had happened to him when he was in India in 2008, the applicant said that he had been in Delhi for most of the time: that was where his father was in hospital. He said he spent just a week in [Town 2] and another week visiting old school friends.
15. The applicant states in the protection visa application that he fears that if he were to return to India he will be ill-treated, he states killed, on account of belonging to a minority group and

that this has happened to other members of his caste, he states to close friends and members of his family. The applicant states that the authorities cannot protect him being harmed because the government wants to get rid of the population of which the applicant is a part. He fears that he will be harmed by 'the group of major religion and the government' who is helping to 'abolish our population' The Tribunal said to the applicant that it had not come across information to indicate that any government of India wanted to eliminate Gujars. The applicant undertook at the hearing to provide material on Gujars to the Tribunal but nothing was received.

16. The Tribunal asked the applicant about what he fears might happen to him if he were to return to India. He said that he had now been away from the country for some time and he felt safe here; he said he had had no troubles or fights here but he would not feel safe in India and that there are riots by Gujars about their status and rights.
17. The applicant stated in the protection visa application that he had had difficulties getting a passport. He writes that he had to 'wait around for a year' and that he had to pay a bribe to get it. The applicant said at the Tribunal hearing that a lot of evidence was required for his passport application, that the police came to his home in the connection with the application and that he paid a bribe to get the passport.
18. The Tribunal asked the applicant why he had not sought a protection visa earlier than July 2012, some five years after his arrival in Australia, if he feared that he would be harmed there. The applicant said that he had not known about protection visas.
19. The applicant said that his mother is a follower of Baba Dhan Satguru. The applicant said that her religious belief had no impact on him nor his fears of what might follow his return to India. The applicant said he is not a religious person and also said that he had no political opinions.
20. The protection visa application form asks applicants if they have any documentary evidence to support their claim for protection. The applicant stated in that application he did and that he needed time to provide them. On 8 October 2012 he sent an email to the Department stating that he had 'requested the Indian police of my state and hospital where I was admitted to send my reports'. He also states that he had 'sent a request to Human Rights Commission India where I filed my complaint in 2007 when I was attacked and was in hospital' He stated that he would have all the documents supporting his case by 23 October 2012. Nothing was submitted to the Department (and the delegate did not wait, deciding on the application on 8 October 2012).
21. The Tribunal asked the applicant about documentary evidence at the hearing. He had brought nothing with him to the hearing and, as already stated, had submitted nothing to the Department, nor to the Tribunal in advance of the hearing. The applicant said that his agent had a First Information Report (FIR) about the 2004 incident and a hospital report confirming that he had been in hospital for two weeks; the Tribunal pointed out that he had said earlier in the hearing that he had been hospitalised for six weeks in 2004 and he said that he had been in a clinic as well as in a hospital.
22. The Tribunal explained to the applicant that it needed to consider whether it would be reasonable for him to relocate to another part of India where there is no real or appreciable risk of the persecution or significant harm he claims to fear might befall him in his home area in Haryana and Uttar Pradesh. The Tribunal noted that he had [siblings] living safely in

Bangalore and that his evidence was that he had spent nearly five months in Delhi in 2008 with no adverse consequences.

23. The applicant said that there are riots in Delhi and that when he was there he was not doing anything to bring himself to notice: he was just looking after his father. He said that caste issues can arise there. The Tribunal asked if there was any reason he could not move to Bangalore where his [siblings] are and he said that unlike his [siblings] he had no qualifications and would not be able to get a job there; that it would be difficult for him; and that he would not be able to do as he wants. The Tribunal suggested that the applicant might have to get a lower level job than what he might like and that he might have to return to study and he said yes.
24. The Tribunal advised the applicant of its concerns with the credibility of aspects of his claims; that nothing having happened to him in 2008 was a relevant factor in the assessment of what might happen to him if he were to return to India; and that it appeared he could avoid the trouble he claims to fear by settling in Bangalore, as his [siblings] have done, or in another place in India. The Tribunal stated many times that it would wait until it looked at the documents the applicant said he would provide before making up its mind about his application.
25. The applicant told the Tribunal that he had been in a relationship with an Australian woman for two and a half years and that they were [getting married]; he said his family is contributing to the costs of the wedding. The woman is [age] and the applicant said they live together. He had not applied for a Partner visa because he did not want his migration status to be a factor in his relationship. He also mentioned the cost of the Partner visa application.
26. At the hearing the Tribunal provided until 12 June 2013 for the applicant to provide further information, documents which he said his agent had, and documents about Gujars and riots. On 12 June 2013 the applicant called the Tribunal and wrote to the Tribunal to advise that he had requested documents from the hospital in [City 1] and these were being posted to him. The applicant was advised that the Member would wait until 21 June 2013 and would then proceed to make the decision on his application. On that day the applicant wrote to advise that he had consulted with the hospital and he expected the documents would be here on Monday (presumably 23 June 2013). The applicant was advised that the Tribunal would consider anything he submitted before the decision was made but would not agree to successive requests for extensions of time. On 1 July 2013, the Tribunal called the applicant to advise that it appeared he had not provided any documents and that the Tribunal intended to make the decision on the application in the week beginning 8 July 2013 and would consider anything that was submitted by then. On 8 July 2013 the applicant wrote to advise that he would bring 'documents of medical reports' to the Tribunal on Thursday (presumably 11 July 2013). Nothing at all was submitted: no medical or hospital reports, no First Information Report nor any supporting documentation about the circumstances of Gujars in India.
27. The Tribunal notes that the applicant said at the Tribunal hearing that his agent was [Mr A]. Whether this person was a registered migration agent or an education agent (who the applicant had also consulted in connection with an earlier student visa application) was not entirely clear to the Tribunal. What is apparent is that on 16 May 2013, the day the Tribunal hearing was initially scheduled to take place, an email was received from the applicant's email address which referred to an earlier phone call to the Tribunal on 14 May 2013 when the applicant had advised he was not well. This email stated 'this is [the applicant]'s cousin

[Mr A]’ and stated that the applicant was not well enough to attend the hearing. The Tribunal had requested a medical certificate when the applicant had called on 14 May 2013 and the email stated ‘I am sending you his medical condition attached’ Nothing was attached. The Tribunal telephoned the applicant to advise of this and the applicant said he would resend it. On 17 May 2013 ‘[Mr A] on [the applicant]’s behalf’ wrote, again from the applicant’s email address, to say that he had tried to attach the medical certificate but had been unable to attach it and had ‘misplaced it in the library’ and that the applicant would get a new one that day and submit it. Nothing was provided. The Tribunal nevertheless set a new hearing time and wrote to the applicant on 20 May 2013 to inform him of this.

28. All this is recorded here because it emerged at the hearing that [Mr A] was the applicant’s migration agent apparently holding documents which the applicant wanted to submit in support of his case. The Tribunal referred to the emails from [Mr A] and the applicant said he was not a real cousin. The applicant said that when he had not been well he had called [Mr A] about what to do and had provided [Mr A] with his email password so [Mr A] could contact the Tribunal on his behalf using the applicant’s own email address.

RELEVANT INDEPENDENT INFORMATION

29. The Dalit Freedom Network website states that: ‘Gujjar or Gurjar is a group or caste of the Indian subcontinent. Alternative spellings include Gurjara, Gujar, Goojar etc. Traditionally, the Gurjars belong to the Kshatriya varna in Hinduism, though a few Gurjar communities are classified under the Brahmin varna’ (‘Definitions’ (undated), Dalit Freedom Network website <http://www.dalitnetwork.org>).
30. ‘The Backward Castes, within which Gujars sit, are agrarian communities who never suffered discrimination in villages like the SCs (Scheduled Castes) did. They did not have as much land as the old feudals had, they occasionally rented land from them, but they did not suffer from the kind of humiliation that burdened the untouchables. After Independence and the abolition of landlordism, this so-called caste of Backwards rose in the rural economic and political hierarchy and many of them became substantial landowners. This is true of castes such as Jats, Gujars, Yadavas and Kurmis. In village India today they are politically the most strident castes and are well represented in many elected bodies as well as in the local administration (Dipankar, G. 2004 *Democratic Potentials in Cultural Politics: Caste Based Reservations and the Issues of Citizenship* Lunds Universitet website, 6-9 July, www.sasnet.lu.se).
31. The Tribunal has read of protests by Gujar people. ‘The root cause of the recent outburst of Gujar fury in Rajasthan is traced to the inclusion of Jats in the list of Other Backward Classes (OBCs) for reservation in Central services in October 1999’ (Venkatesan, V. 2007, ‘Jats as OBCs’, *Frontline*, vol.24, no.15, July/28 August). The article goes on:
- ... Gujjars, who had already been listed under OBCs in the State, then began to assert their demand for Scheduled Tribe status as they feared Jats would deprive them of their existing share in the OBC quota ...
32. The following extract from an article about rioting in Rajasthan in 2008 also provides useful background (‘Indian Gujar caste riots kill 37’ *The Guardian* on 27 May 2008):
- Demonstrations by one of India’s lower castes over demands to be categorised as lower today spread as government forces tried to disperse mobs in the west of the country.

Four days of bloody demonstrations by the Gujjars have so far claimed 37 lives in Rajasthan state, the epicentre of the violence ...

The Gujjars are demanding to be formally declared one of the lowest castes so they can qualify for the government jobs and university places reserved for such groups.

Government officials have refused, insisting the Gujjars remain among the second to lowest official classification.

After a lull in violence yesterday, members of the caste returned to the streets, burning tyres as they set up road blocks near New Delhi and stopping trains in the northern state of Uttar Pradesh for nearly two hours.

Thousands of army, police and paramilitary forces were patrolling villages to control the violence, struggling to clear roads and railways.

Police repeatedly opened fire on violent protests in half a dozen Rajasthan towns and villages on Friday and Saturday.

Apart from the 37 people, including one police officer, who died, another 70 people have been injured. Twenty-six people died in Gujjar riots in the same area last year.

Gujjars took to the streets after a government panel set up to look into their demands recommended an aid package but ruled out caste reclassification.

Government officials have offered to hold talks with the Gujjars, but community leaders turned down the invitation.

Gujjars are considered to be part of the second-lowest group, known as other backward classes, a step up from scheduled tribes and castes, the lowest classification.

The Hindu caste system was outlawed soon after India gained independence from Britain in 1947, but its influence remains powerful and the government awards aid packages to different groups.

RELEVANT LAW

33. 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

34. 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).

35. 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.
36. 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.
37. There are four key elements to the Convention definition.
38. First, an applicant must be outside his or her country.
39. 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 although 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.
40. 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.
41. 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 but 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.
42. 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.
43. 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.

44. The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region, but upon a more general notion of protection by that country: *Randhawa v MILGEO* (1994) 52 FCR 437 per Black CJ at 440-1. Depending upon the circumstances of the particular case, it may be reasonable for a person to relocate in the country of nationality or former habitual residence to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution. Thus, a person will be excluded from refugee status if under all the circumstances it would be reasonable, in the sense of ‘practicable’, to expect him or her to seek refuge in another part of the same country. What is ‘reasonable’ in this sense must depend upon the particular circumstances of the applicant and the impact upon that person of relocation within his or her country. However, whether relocation is reasonable is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic rights. The Convention is concerned with persecution in the defined sense, and not with living conditions in a broader sense: *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51, per Gummow, Hayne & Crennan JJ, Callinan J agreeing.
45. 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

46. 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’).
47. ‘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.
48. 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

49. In accordance with Ministerial Direction No.56, made under s.499 of the Act, from 22 June 2013 the Tribunal has taken into account policy guidelines prepared by the Department of Immigration and Citizenship – Procedures Advice Manual (PAM) 3 Refugee and

humanitarian - Refugee Law Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – to the extent that they are relevant to the decision under review.

CONSIDERATION

50. The Tribunal first considered the applicant's claims against the refugee criterion for the grant of a protection visa.
51. The essence of the applicant's claims for protection is his membership of the Gujar caste, involving the Convention reasons of race and membership of a particular social group. The Tribunal accepts that this is the caste to which the applicant belongs. The Tribunal understands that caste can be a pervasive influence in many people's lives in India and that their treatment and opportunities can be profoundly affected by caste. It is, however, necessary to consider an applicant's particular circumstances because not all members of a particular caste will experience disadvantage, and not all disadvantage involves serious harm and so be capable of constituting persecution as the term is applied in Australia's refugee law.
52. The Tribunal explored with the applicant his experiences as a Gujar and the disadvantage he felt he had faced. The applicant explained that he felt that he had been disadvantaged in his education and that opportunities for Gujar people to attend a good school and obtain entry to higher education were much more limited than for other people. Despite complaining that he did not believe he had obtained a good quality education, the applicant readily conceded that [School 1] which he had attended was a good school. The applicant said that he had sat entrance tests for higher education that he had not been granted admission although others with lower marks were.
53. The applicant's other complaints about the circumstances of Gujar people were very general, for example stating that the government had promised things but had not delivered and that equal rights had not been given to Gujar people.
54. The Tribunal also explored with the applicant circumstances of his father in order to see whether there were indicators that he (his father) may have suffered systemic discrimination on account of his Gujar caste. The applicant's father had worked as a manager in a [business] for some [number] years and is about to retire. The applicant said he held a senior management position and was well known in the local community and the applicant said his father had contacts on the board of [School 1], the good school which the applicant attended. The evidence indicates that the applicant's family was well-to-do, with enough money to fund the applicant coming to Australia to study and the education of his [siblings] in [their chosen fields].
55. Having regard to his past experience of discrimination and mindful of the examples of serious harm provided in s.91R(2) of the Act - a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist – the Tribunal does not consider that what the applicant claims he experienced in relation to his education can reasonably be regarded as systematic and discriminatory conduct or serious harm. Not getting in to higher education when he thought he ought to have gained admission is not serious harm even if the applicant believes that the reason was his caste.

56. Nor is the treatment the applicant claims occurred in relation to his passport of a kind to amount to persecution, if in fact any particular aspects related to his caste. He claimed he had a long wait and had to pay a bribe, and the police came to his home in connection with the application. Whatever inconvenience was involved for the applicant is in the Tribunal's assessment minor and had no consequences. The applicant was issued with a passport which he used to enter Australia and which was good for travel in 2008.
57. The Tribunal also notes that the applicant said that his mother was a follower of Baba Dhan Satguru. The applicant himself said that her involvement with this sect had no impact on him nor on what he fears might happen if he were to return to India. It has therefore not weighed in the Tribunal's deliberations. The applicant said he had no political opinions. The Convention reasons of religion or political opinion do not arise in this case.
58. The Tribunal notes here that the delegate referred to the applicant not applying for a protection visa until some five years after his first arrival in Australia. At the Tribunal hearing the applicant said he had not known about protection visas before then, an assertion which the Tribunal finds hard to accept as credible in the context of all of the evidence before it. Nevertheless, the matter of the apparent delay in seeking protection has had no weight in the Tribunal's deliberations.
59. Whether the applicant was being truthful in aspects of his claims was a question which arose in the Tribunal's mind during its consideration of the applicant's case. The Tribunal had in mind the Tribunal's *Guidance on the Assessment of Credibility* and has taken into account the difficulties which may be faced by asylum seekers, and whether any particular circumstances of this applicant may have affected his capacity to put forward his claims. The Tribunal observes that the applicant has had ample opportunity to make his claims and provide supporting documentation which he claimed to have. While the benefit of the doubt should be given to applicants who are generally credible but unable to substantiate all of their claims, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. Nor is the Tribunal required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been made out: *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.
60. In the applicant's protection visa application he stated that he was injured in the 2002 riots and was hospitalised for three months (corrected to 3 weeks in his evidence at the Tribunal hearing). In 2002 the applicant would have been [age]. At the Tribunal hearing the applicant said that it was in 2004 that he was beaten by supporters of the Samajwadi Party who observed that the applicant and his father was supporting a friend of his father standing for election to a local body. The applicant said he spent six weeks in hospital. At the hearing the Tribunal was told that the applicant had been injured in 2006 when he was beaten up when he went to a Gujar friend's village. He also stated that he was hospitalised as a result, he said at the hearing for two or three days.
61. The Tribunal does not believe the applicant's account of when and how he came to be harmed:
- the applicant was unable to readily recall at the hearing how many times he had been injured, saying twice and then, after his claim of what occurred in 2002 was referred to by the Tribunal, that he had sustained head injuries three or four times. The injuries described by the applicant were quite serious and the Tribunal considers that a person

seeking protection on the basis of such mistreatment as the applicant claimed would be able to remember how many times he had been assaulted if it had in fact occurred;

- the episode in 2004 was not mentioned in the applicant's protection visa application which had claimed that he had been injured in 2002 and 2006. If the applicant had in fact spent six weeks in hospital and a clinic as he said at the hearing, it is hard to see that the episode would have been overlooked when the applicant completed his protection visa application form;
- when the applicant was informed by the Tribunal at the hearing that the 2004 assault had not been mentioned in his protection visa application, the applicant said the documents about each were with his migration agent. Later he told the Tribunal he was obtaining documents about this from the hospital in India. Yet nothing at all was provided; and
- the applicant said that the 2006 episode had been reported to the police and there was a First Information Report about it which he said at the hearing his agent had and which he undertook to provide to the Tribunal. The Tribunal provided ample time to the applicant to do so but no such document was provided.

62. The Tribunal records that it does not expect people seeking Australia's protection to necessarily have documents in relation to their claims but in this case it was the applicant who claimed to have such documents yet they have never materialised.
63. The Tribunal notes that as well as sustaining head injuries in the three episodes he described, the applicant claims that his leg was broken in the 2006 attack. The Tribunal accepts that the applicant may have sustained such injuries in the course of going about his life in India but it does not accept anything he has said in the course of making his protection visa application about the circumstances in which he was injured. The Tribunal does not accept that his injuries were a result of assaults for reasons connected to his Gujar caste, nor to helping a candidate for election in 2004, an episode not even mentioned in his protection visa application.
64. Nor, on the basis of the evidence before it, does the Tribunal accept that the applicant ever took part in any protests or demonstrations about the circumstances of Gujar people. The Tribunal rejects the applicant's claim that his family sent him to Australia in 2007 because of the risk to his safety in India on account of his caste.
65. The applicant claimed in his protection visa application that he was badly treated by government officials but no evidence to support this assertion has been provided and the Tribunal does not accept he was so treated.
66. The Tribunal has found nothing to support the applicant's assertion made in his protection visa application that the government wants to get rid of the Gujar population. The applicant was specifically invited, and undertook, to provide information about the circumstances of Gujar people and he has provided nothing at all.
67. The Tribunal finds that the applicant did not experience persecution in India for any reason he has given in his application but considering claims of an applicant's past experiences is only part of the Tribunal's task and relevant primarily to assist it in looking forward to consider what would happen to the applicant if he were to return to his country and to

determine, on the basis of all of the evidence, whether there is a real chance that he would face persecution for a Convention reason upon return, now or in the reasonably foreseeable future. If the Tribunal comes to the view that there is not such a chance, then the Tribunal must look to see if there are substantial grounds for believing that there is a real risk that he will suffer significant harm in the event that he returns to India.

68. The Tribunal understands that protests and rioting by Gujar people about their status and rights may occur again in future. However, on the evidence before it the Tribunal has found that the applicant has had no involvement with such protests in the past nor been harmed as a result of such incidents or caste-related conflict. The Tribunal has concluded that the chance of the applicant coming to harm as a result of such protests or riots or other caste-related conflict upon his return to the areas where he lived is remote.
69. Having regard to the applicant's own circumstances in India and on the evidence before it, the Tribunal also does not accept that the issue of how the Gujar caste is categorised (the issue at the heart of the conflicts which have occurred over recent years), along with the particular rights and benefits which follow from a lower caste, would lead the applicant to face treatment amounting to persecution. Some Gujar people want a lower caste classification so they can benefit from special programs in relation to employment and education but not having access to such affirmative action initiatives does not constitute persecution for the applicant. He comes from a well-to-do family able to meet the costs of his study abroad and he had a good education in India.
70. The applicant said that while he might have been treated better than other Gujar people when he was in India on account of his father's high status position and contacts, his father was about to retire and so the applicant circumstances could be different upon return as his father would not be in a position to help the applicant get better treatment than other Gujar people. The applicant is now [age] and has lived away from home for nearly six years. The Tribunal does not accept that the retirement of the applicant's father will have any appreciable impact on the chance that the applicant would face treatment amounting to persecution on account of his caste in the reasonably foreseeable future.
71. On the evidence before it, the Tribunal does not consider that there is a real chance that the applicant will, now or in the reasonably foreseeable future, face systematic and discriminatory conduct, let alone serious harm, on account of his Gujar caste if he were to return to the places he has lived in India. The Tribunal has not accepted that any such treatment happened to him in the past and nothing happened to him when he was in the area for some two weeks out of the five months he was in India from August 2008. The applicant's fear of persecution is not well founded.
72. At the Tribunal hearing, the Tribunal canvassed with the applicant the question of relocation in light of his evidence that his [siblings] have lived safely in Bangalore working and studying for some years now. The Tribunal is not aware of any information to indicate that the circumstances for a Gujar person such as the applicant in Bangalore would be any different from those in his home area in so far as the risk of persecution is concerned and the reasons advanced by the applicant as to why he could not move there do not appear to be of a kind to make it unreasonable to him to do so. In the end, however, it has not been necessary for the Tribunal to reach conclusions about the question of relocation because it is found that the applicant's fear of persecution in the areas where he lived is not well founded.
73. The applicant does not meet the refugee criterion for the grant of a protection visa.

Complementary protection

74. The Tribunal has considered the complementary protection criterion for the grant of a protection visa, having found that the applicant is not a refugee.
75. The Tribunal has had in mind the applicant being of the Gujar caste
76. The Tribunal must consider whether, there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia, there is a real risk that he will suffer significant harm. To recap, 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.
77. The Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 states that:

a real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal. The risk must be assessed on grounds that go beyond mere theory and suspicion but does not have to meet the test of being highly probable. The danger of harm must be personal and present.
78. The Tribunal does not consider that there is a real risk that the applicant will face significant harm on account of his Gujar caste or anything else he has mentioned in the course of making his protection claims. He has not experienced treatment which could constitute significant harm in the past and the Tribunal does not consider that there is a real risk that he could face such treatment upon return, and in the reasonably foreseeable future. That kind of discriminatory treatment the applicant has alleged occurred in relation to education and obtaining a passport are not of a kind which approach cruel, inhuman or degrading treatment in the Tribunal's assessment.
79. There are not 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 he will suffer significant harm.
80. The applicant does not meet the complementary protection criterion.

CONCLUSIONS

81. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
82. 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).
83. 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

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