

1417326 (Refugee) [2015] AATA 3897 (10 December 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1417326
COUNTRY OF REFERENCE:	India
MEMBER:	Penelope Hunter
DATE:	10 December 2015
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 10 December 2015 at 3:54pm

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).
2. The applicant, who claims to be a citizen of India, applied for the visa [in] February 2014 and the delegate refused to grant the visa [in] October 2014. In his application to the Department of Immigration and Border Protection (the Department), he claimed to fear harm in India as he was a member of the Congress party and he had been threatened by members of the rival Shiromani Akali Dal party (Akali Dal).

RELEVANT LAW

3. 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.
4. 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).
5. 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.
6. 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').

Section 499 Ministerial Direction

7. 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.

CLAIMS AND EVIDENCE

8. The Tribunal has before it the Department file in relation to the applicant. The Tribunal also had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Application to the Department

9. When lodging the application to the Department the applicant has indicated that he is a citizen of India born in Jalandhar in the state of Punjab on [date]. The applicant states that he speaks, read and writes Punjabi and reads English. He belongs to the Sikh religion and first arrived in Australia [in] July 2009 on a [temporary] visa. He claims to have had [number] years schooling and a further [number] years education at [a] College, in [a town] in the state of Punjab. In India he worked as [an occupation] for two years from [year]. In Australia he has been employed as [another occupation] for 3 years from [year] and [in another job] from 2012 to 2013.
10. The applicant claims to have been married but to have separated from his wife in Melbourne in November 2013.
11. In a statement provided to the Department in support of his application, the applicant stated the following in relation to his claims to need protection:
 - He arrived in Australia with his wife in July 2009. In March 2011 he went back to India to see his family as his father was ill. In April 2011 he went to a Congress party meeting in his town with members of his family. His family has a long record of being staunch Congress party supporters and from an early age he was introduced to politics. When the applicant lived in India he was supporter of the Congress party. He used to attend meetings, campaign behalf of the party and be very vocal in gaining support for the party. He brought to the attention of voters the benefit of voting for Congress rather than the Akali Dal party and he publicly exposed the misrepresentations and empty promises of the Akali Dal. This did not go down well with members of the Akali Dal who were infuriated.
 - After the meeting in April 2011 the Akali Dal members tried to seek revenge against the applicant. He had a dark history with these members. Just before he left Australia in 2009 the Akali Dal members tried to stop him from campaigning against them by using threats and violence. He used to receive numerous threats while he lived with his parents and on a few occasions was physically attacked by the Akali Dal members. On other occasions he was unable to venture out freely from home without being stalked or threatened. Even when he went away to another state, the Akali Dal knew of his whereabouts as they have informants all over India and they tried to kidnap him there as well.
 - The applicant was a victim of the kidnapping and was lucky to have survived. He was thrown into a thick bush with his hands and legs tied and if it were not for some bush explorers he would not have been found.
 - After he was married, his wife applied for a student visa to study in Australia. This was how he managed to escape the persecution of the Akali Dal. His intention was to remain in Australia after his wife completed her studies and obtain permanent residence, so there was no reason for him to return to India. Additionally, his family

were going to come to Australia to visit him regularly but his father became ill and he had no choice but to go back to India to see his father in March 2011.

- While in India in 2011 he attended a Congress party meeting in Punjab. He was with Congress supporters and therefore felt safe to go to this meeting. When he came out of the meeting there was a gang of Akali Dal men waiting for him outside. These men would not let him pass and they began shouting threats that they would get their revenge against him. They assaulted him and he suffered injuries. He managed to escape them with the assistance of the Congress party supporters.
- Afterwards this gangs of Akali Dal members came to the applicant's family home to threaten him. They made threats against his life and attempted to abduct him again while walking on the street. He got no help from the police, it was clear that the police were under the control of the Akali Dal. They did nothing to assist the applicant. In fact they listen to the Akali Dal and wanted to arrest the applicant on false charges.
- For the remainder of the time the applicant was in India he had to go into hiding. He returned to Australia in May 2011 which was earlier than his intended return date. When he returned to Australia he thought he could get permanent residency when her wife completed her studies. Unfortunately he separated from his wife. He cannot return to India as he would face persecution by the Akali Dal party who are now the ruling party in Punjab.
- He will be assaulted as soon as he returns to India. His life will be in danger and he could be killed. He will not be protected by the police as the police are controlled by the Akali Dahl. Their members would harm him physically and execute their threats to kill him.

Department Interview

12. The applicant was interviewed by the delegate [in] September 2014. In his application to the Tribunal the applicant has provided a copy of the delegate's decision. The Tribunal has listened to a copy of the audio recording of the interview and is satisfied that the decision contains an accurate summary of the applicant's evidence. Where relevant, the Tribunal has discussed the information given by the applicant to delegate in its consideration of the applicant's claims.

13. In his decision the delegate set out the following summary of the applicant's migration history:

The applicant arrived in Australia [in] July 2009 on a visa subclass [number], using his old Indian passport [number]. The applicant returned to India from [March] 2011 to [May] 2011. The applicant has been unlawful from [September] 2013 to [February] 2014.

14. In rejecting the application the delegate expressed concerns about the veracity and credibility of the applicant's claims and noted the discrepancy between the applicant's oral evidence and his written claims. The delegate did not accept that the applicant was a member of the Indian National Congress party and was not satisfied that he had been threatened attacked or kidnapped by anyone in India.

Application for Review

15. The applicant appeared before the Tribunal on 26 November 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.

16. At the hearing the Tribunal explored with the applicant his claims, his experiences in India, his relationship with his family, and his political activity. Where relevant the Tribunal has set out his evidence below.

CONSIDERATION OF CLAIMS AND EVIDENCE

Country of Nationality

17. The applicant has consistently claimed that he is a citizen of India, he has provided the Department with a copy of his passport. The Tribunal finds that India is the country of reference for assessing his claims.

Third Party Protection

18. There is nothing in the evidence to suggest that the applicant has the right to enter and reside in any country other than India. The Tribunal therefore finds that he is not excluded from Australia's protection by s.36(3) of the Act. The Tribunal also finds that India is the applicant's receiving country for the purposes of s.36(2)(aa)

Claims

19. The Tribunal found the applicant not to be credible and for the following reasons, has concluded that the decision under review should be affirmed.

Claims in relation to fear of harm from Akali Dal

20. At the commencement of the Tribunal hearing the applicant adopted his written claims as true and correct and told the Tribunal that he had been responsible for the typing of his claims. There were no omissions, alteration or deletions that he wished to bring to the attention of the Tribunal. Yet the applicant provided inconsistent information with his written claims of the threats of harm he endured from the Akali Dal party. The Tribunal was unable to reconcile the many differences. Further, in recounting incidents that the applicant alleged to have occurred to him in India in the past his evidence lacked spontaneity, it did not appear that the applicant was recalling events which had in fact occurred, his evidence was superficial, lacked detail and it appeared that he was making up his evidence as he went along.
21. In his written claims the applicant recorded several incidents when he had been physically assaulted and sustained injury, together with a kidnapping where his hands and legs were bound and he was thrown in bushes. When the Tribunal asked about problems he had with the Akali Dal party the applicant told of anonymous phone calls and could recount only two incidents. The first was in 2006, when he was in the village and boys from the Akali Dal party who had sticks started running after him and he ran away. The second was possibly in 2008, also when he was sitting around in the village. At this time 4 to 5 people came at him from some distance. The applicant claimed that he knew these people were from the Opposition party, that they were the same people who had threatened him before, and he knew that they wished to harm him. However, he also told the Tribunal that he did not know their identity, and they did not get close enough to him for him to recognise them. Despite both these incidents, the applicant told the Tribunal that he was never physically injured by members of the Akali Dal party. When it was put to the applicant that in his written claims he reported physical assaults and that he had been kidnapped, the applicant then tried to correct his evidence and claimed that this had happened as well. When asked why he had not mentioned it he claimed that he had written it, the information was therefore before the Tribunal. The Tribunal does not accept that the applicant would forget to recall these

significant events. The applicant was unable to explain satisfactorily to the Tribunal the reason for the omission of the alleged assaults and kidnapping.

22. Further, the delegate records in his decision that the applicant recounted a different description of the events occurring prior to his departure from India in 2009. To the delegate he claimed that he had only been attacked once and this may have occurred around 2007. The applicant claimed he was attacked just outside his village by a few boys 8-9 in number, but that he could not recognise them. When he saw the boys he ran away and they hit him in the back. There were no other incidents reported to the delegate. Overall, due to these inconsistencies and the concerns about the applicant's credibility, the Tribunal was not satisfied that any incident involving members of the Akali Dal party had occurred prior to the applicant's departure from India in 2009.
23. The applicant was also unable to provide a consistent account of what happened to him when he returned to India in 2011. His evidence to the Tribunal was that he had returned to India for no particular reason and to visit his father who had been ill. He said that a couple of days after he had returned while he was hanging out at the bazaar with acquaintances, 6 or 7 people started walking towards him. One was carrying a hockey stick another had a baseball bat. The applicant recognised these people as members of the opposition party who had chased him before. He ran away and they gave chase. This event occurred at around 3pm. The applicant was not harmed and took refuge in his home. There was no other incident that occurred during his visit in 2011. He did not report the matter to the police as he claimed not want any difficulties with his planned return to Australia. Although the applicant recognised these people as the same people who had chased him on two previous occasions he still maintained to the Tribunal that he did not know their identity.
24. In contrast, the delegate records in his decision that the applicant recounts that on this visit the only places he went was to his home and the hospital to visit his sick father. He is recorded as relating that at one stage the Akali Dal boys did see him, they made a gesture at him and he walked the other way. This was the only incident he informed the delegate that had occurred at that time.
25. The Tribunal is unable to reconcile either of these versions with each other or his written claims of an attack after attending a Congress party meeting in April 2011 in his town with members of his family. To the Tribunal, and the delegate, the applicant made no mention of further political activity upon his return in 2011, and certainly did not claim that he was attacked by Akali Dal members outside a meeting, assaulted and incurred serious injuries. Neither did he recount that threats were made on his life as well as abduction attempts. When these inconsistencies were put to the applicant he declined to comment. The applicant could not offer a satisfactory explanation of his various claims about the police. In particular, why he had told the Tribunal he did not approach the police for fear of upsetting his return to Australia, when in his written claims the applicant set out that he sought police protection but the police wanted to arrest him on false charges. When the Tribunal assesses the evidence it is apparent that in each re-telling of his claims the applicant has presented a different story. Consequently, due to the inconsistencies and overall concerns the Tribunal had regarding the applicant's credibility, the Tribunal is not satisfied that the applicant was ever attacked, chased, threatened or beaten at any time by followers of the Akali Dal when he returned to India in 2011. The Tribunal is not satisfied that the applicant suffered any harm, or threats of harm from the Akali Dal party or anonymous people claiming to be members of the Akali Dal party at any time.
26. The Tribunal also had concern about the applicant's political profile. He claimed to be a member of the Congress party, he was asked at the hearing whether this was the Indian National Congress party and he responded in the negative, but it was only known as the Congress party. He later stated that it was one of the two major parties in India. In his written

claims the applicant stated only that he was a supporter of the Congress Party. In his evidence to the Tribunal he claimed to have been elected to the role of president of youth chapter of the Congress party. When questioned how this election took place, the applicant claimed there was no actual election, it was just a suggestion and everyone agreed. Although he gave himself a title, when pressed for more details he claimed it was just an informal role. The applicant also did not impress the Tribunal as being particularly politically astute. When asked why he supported the Congress Party, he responded only that his family had always done so. When asked what policies drew him to the Congress party, he responded all of them. When asked what set them aside from other parties, his response was that they were less corrupt. As president the applicant claimed his role was to transport people and organised tents for rallies. He provided a description of physical work rather than actual campaigning or promoting policies. This is in contrast to his written claims where he states he was active in campaigning on behalf of the party and used to be very vocal in gaining support, and exposing misrepresentations of the Akali Dal party. The applicant also claimed he could prove his claims were correct. The Tribunal question the applicant as to what further proof he could provide other than his oral evidence. The applicant then claimed not to have experience with the process of claiming protection and requested direction as to any necessary documents. In his decision the delegate notes that the applicant had offered, but failed to provide, a membership card of the Congress party and a letter of support from his local Member of the Legislative Assembly. When this lack of evidence was put to him the applicant claimed he had been stressed lately with the death father. He did not offer to provide any further documents. Further the claimed recent passing of his father, did not explain to the Tribunal why the applicant has not presented any evidence in support of his claims to the Department or the Tribunal since his original application was lodged in February 2014.

27. The applicant reported that his father had recently died. He variably stated that this had occurred 2 to 3 months earlier or 3 to 4 months earlier. His family had waited approximately a month to tell him as they did not want to stress him. He also reported that he had telephone contact with his family every 2 to 3 days. When assessing credibility, the Tribunal is mindful that it must be sensitive to the difficulties facing refugee applicants and that they should be given the benefit of the doubt when generally credible but unable to substantiate all claims. However the Tribunal is not required to accept uncritically any and all allegations made by the applicant. In addition the Tribunal is not required to have rebutting evidence before it finds that a particular fact or assertion has not been made out. The Tribunal was mindful of the applicant's claim that he felt stressed. The Tribunal also enquired as to whether the applicant had sought medical assistance for his stress, however he claimed he did not have a medical condition. The applicant confirmed that he was able to participate in the hearing fully, that he understood the interpreter and throughout the hearing he responded appropriately to questions put by the Tribunal. The Tribunal is not satisfied that any stress the applicant was feeling of the day of the hearing could account for the many and varied discrepancies in his evidence to his previous written claims. Due to these discrepancies, the limited knowledge that the applicant demonstrated of the Congress Party in India, and the lack of any supporting evidence, the Tribunal is not satisfied that the applicant was involved in politics as a member of the Congress party, or acted as youth president, or did any activities to support the parties to the extent claimed. The Tribunal is not satisfied that the applicant had a profile beyond that of an ordinary supporter, and particularly finds that he did not have a profile that would cause concern to opposing party members and give rise to any risk of harm.

Claims in relation to threats by the applicant's in-laws

28. The applicant also told the Tribunal that he was in fear of being killed by members of his wife's family if he returned to India as they had divorced.

29. The Tribunal questioned the applicant about his marriage. He could not recall when he married his wife. He claimed this was because she left him and he forgot. When pressed by the Tribunal he claimed it may have been 8 or 9 months prior to him coming to Australia in 2009. His wife did not work in India and he could not recall what she was studying in Australia. Later he claimed that it may have been something to do with electronics. He told the Tribunal that his wife had left him 2011, after he had returned from India. He did not know why she left, and suggested that maybe she went off with another man. He claimed that she had divorced him. Initially the applicant was not sure whether this had taken place in India or Australia. Later he claimed that it was probably Australia. He did not find out about the divorce for a long time and had not actually have been served with any paperwork in relation to the divorce. He just knew because family had told him. He found out in 2012 when his visa was going to expire. His marriage was an arranged marriage and they were introduced by his cousin. He has not seen his wife since 2011, and he did not know where she is and is not sure whether she is still in Australia.
30. The Tribunal considered that the applicant's evidence about his relationship with his wife, his marriage and separation to be vague and unreliable. He was unable to answer simple questions such as when they were married and the purpose of his wife's study in Australia. His evidence that it was an arrange marriage was inconsistent with the information that he provided to the delegate that his wife's family disliked him because it was a love marriage. Due to the vague and evasive nature of his evidence the Tribunal had difficulty accepting his claims of harm as credible.
31. Further the applicant did not raise in his written application any claims of fear of harm from the family of his wife. The claim was first mentioned before the delegate, and the delegate clearly sets out in his decision that the applicant gave conflicting evidence of who in his wife's family threatened to harm him and when the alleged threats had been made. The applicant is recorded as stating that his wife's brother threatened him over the phone in 2012, later it was a cousin. He claimed to have omitted it from his written account as his family only told him about it 2-3 months prior to his interview with the delegate, which occurred in September 2014.
32. The applicant gave the Tribunal a different story. To the Tribunal he claimed that when he rang his mother-in-law in India, around 2011, she was very abusive to him. She said that he had done wrong by her daughter and they were not going to let him live. This was the only time that he received a threat from his wife's family directly. When his mother-in-law spoke to him the applicant told the Tribunal that he heard voices in the background which he thought came from her brother. He overheard the threat that if he went to India, they would kill him. Additionally, the applicant claimed that his family has always receives calls to his home in India. His family only recently told him about this after his father had passed away. He is not sure who was making the threats as when they call his brother they give different names. The applicant claimed that the phone calls were going on all the time, although his family was not telling him everything as they did not want him to get stressed. The threats were along the lines of "if *your son comes here he will not live. They will not leave him alone.*" He has fear of 4 or 5 of his wife's cousins. The applicant told the Tribunal that he thinks that they will kill him. The applicant considered that the fact that the calls are still going on to his family means that they are obviously still after him. He told the Tribunal that he did not mention these threats in his written claims when he lodged his Protection application as he did not have a lot of knowledge about claiming protection and he just put in what his friend, who assisted him with his claims, advised.
33. There are clear and apparent contradictions in the applicant's evidence as to who in his wife's family is threatening him and when this threat occurred. His evidence to the Tribunal that he was personally threatened once by his mother-in-law was inconsistent with what he told the delegate. Before the delegate his evidence shifted from a claim it arose from his

brother-in-law to his wife's cousin. Finally he told the delegate he was afraid of just one cousin. To the Tribunal he claimed that 4 to 5 of his wife's cousins wished to harm him. He also gave alternate versions to the Tribunal and the delegate, as set out above, as to when he was informed of the threats. If the applicant's life had truly been threatened the Tribunal considers that he would have remembered who it was that threatened him and been able to recall with greater reliability when this threat occurred. In addition to the inconsistency in the applicant's evidence on this issue, the Tribunal does not accept the various excuses he provided for the lateness of the claim. The applicant has told the Tribunal and the delegate that he was aware of the threat prior to lodging his claim. The Tribunal considers that as this is one of the reasons he claims that he cannot return to India and he fears that he will be killed, had the threat actually occurred he would have included it in his initial written claims. The Tribunal does not consider that the evidence of the applicant is credible on this matter and does not accept that he has been threatened by his wife's family, by her mother, brother or cousins and the Tribunal is not satisfied that the applicant has a fear of any harm if he were to return to India for this reason.

Delay in claiming protection

34. Finally there is the inordinate delay claiming protection which the applicant was unable to satisfactorily explain. The applicant has proffered several reasons for this delay. He claimed that a friend had not told him about the possibility of a Protection visa until 2011. He also claimed that he was relying on his [temporary] visa, and although his wife had left him in 2011, and he has not seen her since, he was hopeful that they would reconcile until he found out she had divorced him in November 2013. None of these satisfactorily explain why, as the applicant's visa expired in September 2013, he waited until February 2014 to lodge a Protection visa application. Particularly when events giving rise to his fear from the Akali Dal party had occurred prior to 2009 and again in 2011, and any threats from his wife's family had allegedly also occurred in 2011. The Tribunal finds this delay undermines the applicant's claims of fear of harm arising from incidents in 2009 and 2011, and also reflects poorly on the applicant's credibility. Particularly as the applicant has consistently stated that he always intended to remain permanently in Australia. In his written claims the applicant has stated that when he came back to Australia in 2011 he thought that his wife would get permanent residency and that he could stay in Australia permanently. The delegate also records that a reason the applicant offered for not making a Protection visa application in 2009 was that his wife was in Australia and they were going to seek permanent residency. The applicant reiterated this claim to the Tribunal. From his own evidence it is clear that the applicant always intended to remain permanently in Australia. The delay and the fact that the applicant was unable to give a consistent account of his claims leads the Tribunal to conclude that he has manufactured the entirety of his claims in order to obtain a positive migration outcome.
35. The Tribunal is not satisfied that the applicant has been threatened with harm or experienced any harm incidents in the past from his wife's family, or members of the Akali Dal Party. The Tribunal also finds that the applicant does not have political profile that would give rise to any risk of harm. Having rejected all of the applicant's claims, the Tribunal is not satisfied that his fears are well founded. The Tribunal is not satisfied that the applicant has a real chance of any harm from his wife's family, or due to his political opinion, or for any other reason were he to return to India now or in the reasonably foreseeable future.
36. The Tribunal also considered whether the applicant faces a real risk of significant harm. Other than fear from his wife's family and threats from members of the rival Akali Dal party the applicant has raised no other discrete protections claims. On the basis of the Tribunal findings in relation to those claims, in the absence of any claims suggesting that the applicant is at risk of significant harm for any other reason, the Tribunal is not satisfied that there are substantial grounds for believing, that as a necessary and foreseeable

consequence of the applicant being removed to India, there is a real risk he will suffer significant harm.

Conclusion

37. 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).
38. 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).
39. 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

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

Penelope Hunter
Member