

1501466 (Refugee) [2016] AATA 4052 (6 July 2016)

### DECISION RECORD

**DIVISION:** Migration & Refugee Division  
**CASE NUMBER:** 1501466  
**COUNTRY OF REFERENCE:** India  
**MEMBER:** Tigilagi Eteuati  
**DATE:** 6 July 2016  
**PLACE OF DECISION:** Brisbane  
**DECISION:** The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 06 July 2016 at 6:56pm

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] June 2014 and the delegate refused to grant the visa [in] January 2015.
3. The applicant appeared before the Tribunal on 12 November 2015 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Gujarati and English languages.

### RELEVANT LAW

4. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, 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

5. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations 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).
6. 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.
7. 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.
8. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
9. 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.

10. 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.
11. 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.
12. 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.
13. 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.
14. 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**

15. 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').
16. '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.

17. 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**

18. 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**

19. In his application for a protection visa the applicant made the following claims:

*"I was born in a lower- caste Hindu family in the state of Gujarat, India. Hindus like me belonging to lower caste are unofficially declared as untouchable and are given a second grade citizen treatment in the Gujarat state. I was forced to sit on the back benches in the school. Whilst I was in college I became a member of Bhujan Samaj Party (BSP). I came to know that the ideal of the Bharatiya Janata Party (BJP) are economic self reliance, uniform civil code and cultural nationalism. But I have not been able to accept the polarise Indian society by provoking communal riots.*

*The ideology of BSP is social transformation and economic emancipation of the 'Bahujan Samaj', which comprises of the schedule castes, schedule tribes, backward class and religious minorities such as Sikhs, Muslims, Christians, Parsis and Buddhists.*

*After becoming a member of the party I became involved in various activities to help to increase its popularity within our community. I have organised processions against BJP. We have been victims of the 'Manuwadi' system in the country for years, under which we have been vanquished, trampled upon and forced to languish in all spheres of life. In other words we were deprived even all those human rights, which had been secured for the upper caste Hindus.*

*After the demonstration I became well known to the opposition party and they realised that this could be the start another big movement against the BJP in Gujarat state. I was threatened by the BJP members and they also threatened my family members. But my political belief and expression of this could not hinder by this intimidation and pursued with my political view. I was even canvassing house to house distributing leaflets and organising mini meeting among the minorities.*

*On July 2008, I was at party meeting when attacked by the BJP members, they grabbed my shirt, I was dashed to the ground and kicked, and blood was*

*gushing from my mouth in front of all members. They threatened to kill me and warned other not to follow me. This has, caused lasting damage mentally and physiologically. I decided to leave the country after that to save my life. I had to borrow money from a private lender to come to Australia. I could return the money and the lender asking double of the original amount. They went to my home and threatened my parents. My parents have moved out of the family home and hiding from them in a village. I am very worried about them my self if I have to return back to India.*

*I have not returned to India since arriving in Australia because of fear of persecution. I am very depressed and traumatised over my helpless situation. I have much difficulty in sleeping at night because of the all worry. I am seeking protection in Australia so I can cherish to be free from persecution and oppression.”*

20. At the hearing before the Tribunal the applicant stated that he did not fear being persecution by reason of his belonging to the Panchal artisan caste. He said that his fears of return to India related to his previous involvement in politics in India and his having borrowed money from his [Relative A] in order to travel to Australia.

#### **Money lender**

21. The applicant claimed that he had borrowed the equivalent of AUD\$[amount] from his [Relative A, named] in order to pay for his move to Australia. He said that his [Relative A] owned a construction business with his other [Relative B,named]. The applicant said that [Relative A] lent him the money from his savings.
22. The applicant claimed that towards the end of 2011 his parents told him that both [Relative A and Relative B] had visited his parents and said words to the effect “when will your son return my money.” The applicant claimed he was told that his [relatives] used abusive or vulgar language and had grabbed a hold of his father’s shirt. The applicant said that no threats had been made and there had been no violence. The applicant said that from that time until the present his parents told him that similar incidents occurred every month.
23. The Tribunal asked the applicant why he had claimed in his application that he had borrowed from a private money lender rather than his [Relative A] and he said that it was untrue that he had borrowed money from a private money lender but declined to comment further. The Tribunal asked why the applicant had I claimed in his application that “*the lender asking double of the original amount. They went to my home and threatened my parents. My parents have moved out of the family home and hiding from them in a village.*” The applicant indicated that he did not wish to comment.
24. The Tribunal noticed that the applicant had told the Minister’s delegate that he had borrowed money from a money lender named [Mr A]. The Tribunal asked the applicant if he was familiar with a [Mr A] and the applicant claimed that [Mr A] was the name of one of the men who had physically assaulted him in 2008. He said that in 2008 between 8-10 men, one being [Mr A], assaulted him while he was attending a BSP meeting. He said that [Mr A] was a supporter of the BJP Party who assaulted him because the applicant was a member of the rival BSP party. The Tribunal asked whether there was anyone else involved in the attack on the meeting other than the 8-10 BJP members and the applicant indicated that there was not.

25. The Tribunal indicated that the applicant had previously told the Minister's delegate that [Mr A] was the money lender or "Shrouff" from who he had borrowed money. The applicant indicated that he had no comment to make on the contradictory evidence.

### **Political involvement**

26. The applicant claimed to have become a supporter of the BSP in January 2008. When asked whether any particular people influenced his decision to follow BSP he said that he was not influenced by anyone in particular. He said that he knew many people of his caste were supporters of the party so he attended a meeting of the party in January 2008. He said that the meeting was held at [a named] School in his hometown [named]. He said that the local BSP candidate for the area was speaking at the meeting so he decided to attend by himself. The applicant said he could not remember the name of the BSP candidate. When asked about the meeting the applicant said that the candidate spoke about how to improve the party and how to help people. When asked for more detail the applicant claimed that the candidate said that the party would be improved by increasing support for the party which would be accomplished by providing people with clothes and food. The applicant was unable to offer any further detail about the meeting but claimed that he attended for about two hours.
27. The applicant claimed that he went to one other BSP meeting which he said took place in February 2008 in a town called [name] about 6 km from [his home town]. He said that the same candidate spoke about the same things he had at the previous meeting in [his home town]. The applicant could not give any further details about what occurred at the despite the Tribunal asking the applicant to do so. The applicant said that he attended for about half an hour on this occasion. The applicant claimed that he had not been to any other BSP meetings and his involvement with the party was limited to attending these two meetings.
28. The applicant was reminded that in his application he had indicated that he had been attacked while attending a BSP meeting in July 2008 and that he had told the Minister's delegate that the attack had occurred at a BSP meeting in 2008. The Tribunal indicated that this appeared to be inconsistent with his claim that he only attended two BSP meetings one in January 2008 and one in February 2008. The applicant declined to comment on the inconsistency.
29. The applicant was reminded that he had told the Minister's delegate that he had began following the BSP "during [specified school years]" after listening to his friend [Friend A] speak about the assistance that BSP gave to the poor orphaned and lower classes. The applicant claimed he did not know anyone named [Friend A]. Noting that the applicant said that he finished high school in [earlier year], the Tribunal indicated that the applicant's previous evidence appeared to be inconsistent with his claims at the hearing that he began to follow BSP in 2008 after attending a meeting. The applicant declined to comment.
30. The applicant was reminded that he had told the Minister's delegate that he had been attacked in June 2008 during a BSP meeting of about 20-25 BSP followers by around 200 BJP members. The Tribunal indicated that this appeared to be inconsistent with his evidence at the hearing that 8-10 BJP members, one being a [Mr A], attacked the BSP meeting in 2008. The applicant declined to comment on the apparent inconsistency.

31. The applicant was asked to describe the attack which he had previously claimed to have occurred in June/July 2008 and the applicant declined to do so despite numerous requests.
32. The applicant indicated that he attended BSP meetings in the lead up to elections in Gujarat in 2008. The Tribunal indicated that it could not find any information which indicated that any elections were held in Gujarat in 2008 and asked the applicant whether he wished to comment. The applicant declined to comment.
33. The applicant was asked basic questions about the BSP including the name of the founder of the party, when the party was founded, where its headquarters were based, the name of its current leader and the symbol of the party. The applicant could not answer any of the questions.

### **Caste**

34. The applicant claimed that he was a Panchal which he agreed was a collective term for artisanal caste groups of people who traditionally worked as blacksmiths, carpenters, goldsmiths, stonemasons and coalmen. The applicant said that his father and uncle were [an occupation] and his [other relatives] were builders. The applicant said that while there may have been problems for Panchals in the past, this was no longer the case and that he did not fear persecution in India on the basis of his caste.
35. The applicant stated that his claims were limited to fear of harm arising from having borrowed money from his [Relative A] and from his political involvement.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

36. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
37. The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is 'well-founded' or that it is for the reason claimed. Similarly, that an applicant claims to face a real risk of significant harm does not establish that such a risk exists, or that the harm feared amounts to 'significant harm'. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. A decision-maker is not required to make the applicant's case for him or her. It is the responsibility of the applicant to specify all particulars of the claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish the claim. The Tribunal does not have any responsibility or obligation to specify, or assist in specifying any particulars of the claim, or to establish or assist in establishing the claim: s.5AAA. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)
38. The Tribunal finds the applicant is a national of India. He provided a copy of the identity information pages of his Indian passport to the Department. The applicant made no claim to be a national of any other country. The Tribunal accepts the applicant's claims should be assessed against India for the purposes of the Convention in s.36(2)(a) and as the receiving country for the purposes of the complementary protection obligations in s.36(2)(aa). In making the below findings, the Tribunal has considered the village in which he last lived to be his home region. As the Tribunal is not satisfied that there is a real chance that the applicant would suffer serious or significant harm, if he returned to India, it is unnecessary to determine

whether the applicant has a right to enter and reside in Nepal under the India-Nepal Treaty of Peace and Friendship.

### **Money lender**

39. The Tribunal does not accept that the applicant ever borrowed money from a money lender, either a private money lender or from his [Relative A]. The Tribunal finds that the applicant has fabricated this claim to bolster his protection visa claims.
40. The applicant's claims relating to this claim were inconsistent and implausible. In his initial application and again before the Minister's delegate the applicant claimed that a private money lender lent him money whereas the applicant claimed at the hearing that it was his [Relative A] who had lent him the money. When this inconsistency was put to the applicant he said that it was untrue that he had borrowed money from a private money lender but declined to comment as to why he had provided inconsistent information.
41. In his application the applicant had claimed that "the lender asking double of the original amount. They went to my home and threatened my parents. My parents have moved out of the family home and hiding from them in a village." At the hearing the applicant claimed that his parents were not threatened by the money lender and mentioned nothing about his parents having to flee their home or the money lender "asking double of the original amount". When these inconsistencies were put to the applicant he declined to comment.
42. The Tribunal noticed that the Minister's delegate's decision, which the applicant provided to the Tribunal, indicated that the applicant had told the Minister's delegate that he had borrowed money from a money lender named [Mr A]. The Tribunal asked the applicant if he was familiar with a [Mr A] and the applicant claimed that [Mr A] was the name of one of the BJP supporters who had physically assaulted him in 2008 because he was a BSP supporter. The Tribunal indicated that the applicant had previously told the Minister's delegate that [Mr A] was the money lender or "Shrouff" from who he had borrowed money. The applicant indicated that he had no comment to make on the contradictory evidence.
43. These inconsistencies and the applicant's failure to provide any explanation for them strongly indicate to the Tribunal that the applicant fabricated the claims to have borrowed money and to have been threatened for his failure to repay the money. The Tribunal finds that the applicant has fabricated this claim to bolster his protection visa claims. The Tribunal finds that the applicant will not face harm from any money lender if he returns to India.

### **Political involvement**

44. The Tribunal does not accept that the applicant was ever a member or a supporter of BSP or that he was ever harmed or threatened for his membership of, or support for, the BSP.
45. The applicant's claims in his application and before the Minister's delegate were inconsistent with his answers at the hearing.



46. At the hearing the applicant claimed that he joined the BSP party in January 2008 when he attended a BSP meeting at a local high school. He said that no one had encouraged him to join the party.
47. The applicant was reminded that he had told the Minister's delegate that he had begun following the BSP "during [specified school years]" after listening to his friend [Friend A] speak about the assistance that BSP gave to the poor orphaned and lower classes. The applicant claimed he did not know anyone named [Friend A]. Noting that the applicant said that he finished high school in [earlier year], the Tribunal indicated that the applicant's previous evidence appeared to be inconsistent with his claims at the hearing that he began to follow BSP in 2008 after attending a meeting. The applicant declined to comment.
48. The applicant claimed that he attended only two BSP meetings one in January 2008 which lasted for two hours and another which he attended in February 2008 that lasted for 30 minutes. The applicant did not claim to have been attacked at either meeting. The Tribunal indicated to the applicant that in his application and before the Minister's delegate he had claimed to be actively involved with the BSP including that he had attended a BSP meeting in June or July 2008 during which he was beaten. It was pointed out that the applicant had claimed before the Minister's delegate that he had been attacked by 200 BJP members and that earlier at the hearing he had claimed that 8 to 10 BJP supporters had beaten him in July 2008. The Tribunal indicated that these claims appeared to be inconsistent with each other and that they were both inconsistent with his claims later in the hearing that he only attended two BSP meetings and was never beaten. The applicant declined to comment.
49. The applicant was asked to describe the attack which he had previously claimed to have occurred in June or July 2008 and the applicant declined to do so despite numerous requests.
50. These inconsistencies and the applicant's failure to provide any explanation for them strongly indicate to the Tribunal that the applicant fabricated the claims to have been a member of BSP and fabricated his claims to have been harmed for any political involvement with the BSP. This finding is also supported by the applicant's vague and unconvincing description of what occurred at the BSP meetings and his inability to name the local candidate he went to the meetings to hear speak. The Tribunal finds that the applicant has fabricated this claim to bolster his protection visa claims. The Tribunal finds that the applicant has never been a member or supporter of BSP and will not face harm for political involvement with the BSP if he returns to India.

### **Caste**

51. The Tribunal accepts that the applicant is a member of the Panchal caste which is a collective term for artisanal caste groups of people who traditionally worked as blacksmiths, carpenters, goldsmiths, stonemasons and coalmen. However, the Tribunal does not accept that the applicant ever suffered serious or significant harm for being a member of the Panchal caste and finds that he will not suffer serious harm for this reason if he returns to India.
52. The applicant said that while there may have been problems for Panchals in the past, this was no longer the case and that he did not fear persecution in India on the basis of his caste. The Tribunal notes that this is in accordance with the country information accessed by the Tribunal. While there is information which indicates that some of the lowest castes, for example Dalits, have suffered discrimination and harm by reason of their caste, the Tribunal has not found any information which indicates that Panchals, a

lower-mid-level caste, suffer persecution or serious or significant harm because of belonging to the Panchal caste.

### Conclusions

53. After assessing all the evidence and being mindful of the applicant's personal circumstances, the Tribunal has considered the claims of the applicant individually and cumulatively. For the reasons mentioned above, the Tribunal finds that there is no real chance that the applicant would suffer serious harm if he returned to India. The Tribunal is not satisfied the applicant has a well-founded fear of persecution for any Convention reason now, or in the reasonably foreseeable future if he returns to India. Therefore, the applicant does not satisfy the requirements of s.36(2)(a).
54. The Tribunal has also considered the application of s.36(2)(aa) to the applicant's circumstances. In making its findings, the Tribunal has considered the Complementary Protection Guidelines as required by Ministerial Direction No.56, made under s.499 of the Act.
55. For the reasons set out above, the Tribunal is not satisfied, on the evidence before it, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to India there is a real risk the applicant will suffer significant harm, in the form of: arbitrary deprivation of life; the death penalty being carried out; torture; cruel or inhuman treatment or punishment, or degrading treatment or punishment. Therefore the applicant does not meet the requirements of s.36(2)(aa).
56. 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

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

Tigiilagi Eteuati  
Member