1415208 (Refugee) [2015] AATA 3527 (16 October 2015)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1415208
COUNTRY OF REFERENCE:	India
MEMBER:	Chris Thwaites
DATE:	16 October 2015
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicants Protection visas.

Statement made on 16 October 2015 at 3:50pm

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 applicants Protection visas under s.65 of the *Migration Act 1958* (the Act).

2. The applicants, who claim to be citizens of India, applied for the visas [in] July 2013 and the delegate refused to grant the visas [in] August 2014.

CONSIDERATION OF CLAIMS AND EVIDENCE

3. The Tribunal has before it the Department's files relating to the applicants' protection visa applications and the Tribunal's file relating to the review application.

4. Departmental records indicate the first named applicant (the applicant) first came to Australia [in] November 2002 and departed [in] November 2002. Then the applicant and his wife (the second named applicant) arrived in Australia [in] October 2006 on subclass 676 visas and made their first protection visa application [in] November 2006, with the applicant making claims to be a refugee and the second named applicant included as a member of the family unit who does not have their own claims to be a refugee. That application was refused [in] January 2007 because the delegate was not satisfied the applicant had suffered Convention-related persecution in the past, or will suffer persecution in the reasonably foreseeable future. The delegate was not satisfied the applicant was a person to whom Australia has protection obligations and therefore refused to grant the visa, and also refused to grant a visa to the second named applicant. The Refugee Review Tribunal (RRT) affirmed that decision on 12 April 2007. Subsequent applications for judicial review were dismissed by the Federal Court [in] March 2008, the Full Federal Court [in] May 2008, and the High Court [in] September 2009. An application for Ministerial Intervention was finalised as "Not Considered" [in] June 2009.

5. [In] 2010 the third named applicant was born to the applicant and the second named applicant. [In] October 2012 an applicant for a protection visa was made for the third named applicant, although no protection claims were made in [the] application forms and [he/she] indicated [he/she] wished to use the application as a pathway towards a Ministerial Intervention and waived [the] rights to an interview. That application was refused [in] November 2012 because the delegate was not satisfied Australia has protection obligation to the third named applicant under s.36(2)(a) and (aa). That decision was affirmed by the RRT on 11 June 2013, who considered the claims made on [his/her] behalf by his father, the applicant. That Tribunal was not satisfied there was a real chance the third named applicant will suffer serious harm in India, or that there are substantial grounds for believing that as a necessary and foreseeable consequence of the third named applicant's removal from Australia to India, there is a real risk that [he/she] will suffer significance harm. That Tribunal was not satisfied the third named applicant was a person whom Australia has protection obligations under s.36(2)(a) or (aa).

6. [In] July 2013 the applicant made his second protection visa application, including his wife and his [child] as members of the same family unit who do not have their own claims for protection.

7. The applicant's written reasons for claiming protection are contained in his visa application form and an attached written statement. In his visa application form the applicant claims he is an active member of the Bharatiya Janata Party (BJP), and due to his political opinion supporting the BNP party he fears he will face a real risk of significant harm in India. The

applicant claims Narenda Modi from Gujarat is going to contest the election on behalf of the BJP party and that Congress and its allies will target and harm BJP members and activists. In addition the applicant claims that because he has stayed in Australia for a considerable period, the criminal elements associated with the anti-BJP parties will perceive him as a person with wealth and target him and may abduct his child to extort money from him. The applicant fears he will face significant harm if he returns to India and he fears he will not get state protection because the authorities are either corrupt or ineffective. He fears that if he moves to other parts of India he will continue to face harm.

8. In summary, the applicant claims in the attached written statement that he was an active member of the BJP, handling all activities of his area. He was interested in politics since his childhood because his father was working with Vishwa Hindu Parishad known as VHP and Rashtriya Seva Sangh known as RSS. The applicant studied a Bachelor [degree] and was married in [2005]. The applicant was handling the office of BJP in his area during his stay in India as he was an active member of the party. During that time, there was an office of the Congress party nearby in an area dominated by the Moslem community. During election times there was very sensitive atmosphere between these two opposition parties' workers due to communal mishap. Conflicts occurred at almost every event. The applicant was taking leadership of a canvassing campaign, as a young energetic active member of the party he was respected by all other members. During these activities he came to the attention of some of the members and activist of the opposition party. During canvassing people used to threaten the applicant and his colleagues and abuse their party, but they ignored this as it is common in India during election time canvassing. These people's activities were totally different and scaring but they ignored them as they were busy canvassing and arranging public meetings. The BJP won the maximum seats in Gujarat and came to rule the State and the applicant and all the members of his party were very happy and managed a great procession. The procession passed through the sensitive area and some of the opposition party's people threw stones and people started rushing to save their lives, but the police came and everything was ok.

9. After that, the applicant forgot all these things and was busy in his routine life and started his business in partnership with another person. He was enjoying his daily life as well is participating in his political party. Life was passing very smoothly with good success in his new business although the applicant did not know his enemies were active and created a intelligent conspiracy to destroy him financially. They convinced his business partner in their favour. His business partner was greedy for money and trapped the applicant in a financial blunder with the help of his political enemies. It was published in the local newspaper and the applicant's business collapsed slowly. The applicant was abducted by unknown people for ransom and after getting money those people released him. After a couple of months he was living as usual but coming home from his office late one night some people waved down his vehicle and when he stopped he was attacked. They ran away before he could recognise them. Some people helped him and called his home and his family members came and took him to hospital. He complained to the police but was not sure who attacked him so it was difficult for the police to search for those people.

10. Six months after that incident, when everything was going smoothly, the applicant and his wife were riding his motorbike returning from his relative's place back to his home at night, when the applicant realise some people were chasing him in another vehicle. They overtook the applicant and threw some kind of explosive thing towards him. It came on just near his bike, his wife screamed and was injured little. The applicant drove fast and reached his home. After that incident he understood that some people were keeping an eye on him and his wife and attacking whenever they got the chance. The applicant and his wife were so scared and his family members were also scared but they couldn't change the place of residence as it was their own home made by their ancestors. So for some time the applicant went to live at his father-in-law's home with his wife which is around [number] km away from

his city. When they were there some of their neighbours said that they saw some unknown people who were asking about the applicant, so his father-in-law was also scared. The applicant's wife thought not to trouble them, so they returned to their home. The applicant left his work for the political party and stopped going for his business to. The applicant was concerned about how long he could stay without earning and was helpless to take the help of the police and other authorities because he did not know who was attacking him, for without proof, nobody can take action against these people. Due to these frequent attacks the applicant's life became very miserable and they were feeling scared to go anywhere. The applicant was sure the next time these people were sure to kill him. After some time his relatives and well-wishers suggested he leave India. The applicant thought this was right and the only way to save his life and his future. So he went to Delhi with his wife and applied for visitor visas for Australia and came to Australia. The first and second named applicants appeal to the government to grant them protection for their lives are not safe in their home country and the applicant is scared to think of even going back.

11. [In] August 2014 the delegate refused to grant the applicant a protection visa application because the delegate was not satisfied the applicant faced a real chance of persecution on return to India for any Convention reason. The delegate was also not satisfied that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant's removal from Australia to India, there is a real risk that he will suffer significance harm, therefore the delegate was not satisfied Australia has protection obligations to the applicant under s.36(2)(a) or (aa). Therefore the delegate also refused to grant the second and third named applicants protection visas.

12. On 9 September 2014 the applicants applied to the Tribunal for review of that decision.

13. On 3 September 2015 the applicants' representative submitted a memorandum of [advice] dated [November] 2014 in relation to the operation of s. 48A and the Federal Court decision in *SZGIZ v MIAC* (2013) 212 FCR 235.

14. The applicants appeared before the Tribunal on 22 September 2015 to give evidence and present arguments. The Tribunal took evidence from the first and second named applicants. The Tribunal did not take evidence from the third named applicant due to [the] young age. The Tribunal hearing was conducted with the assistance of an interpreter in the Gujarati and English languages. The applicants were represented in relation to the review by their registered migration agent who attended the hearing.

15. During the hearing the applicant told the Tribunal his written statement was a copy of the statement made for his first protection visa application. The applicant told the Tribunal that he fears returning to India because if he goes back, what happened before, may happen again. He told the Tribunal there is more freedom in Australia, and his family has lived in [a town] for nearly nine years and they are settled in the community and culture, and his [child] was born here and has started attending school, and he thinks it's better in Australia, and he wants his [child] to grow up in Australia. The applicant also told the Tribunal he is concerned that the same people will be there if he returns to India, and they may take revenge on him for what happened before, and he does not know what the situation is there now and what people may think. The Tribunal also discussed with the applicant his concerns about being perceived as a wealthy person if he returns to India. The second named applicant told the Tribunal she wants permission for her child to stay in Australia. During the hearing the representative also raised the issue that the applicant appears to have made a claim on behalf of his [child] in relation to the risk that [the child] may be kidnapped and held to extort money from [the] father, if they were returned to India.

16. At the conclusion of the hearing the Tribunal granted seven days for the applicants to provide any further evidence in support of the application, including any further country information.

17. After the hearing on 22 September 2015 the Tribunal received an email from the representative referring to *MZZM v Minister for Immigration & Anor and MZAFB v Minister for Immigration & Anor* [2014] FCCA 2665 (19 November 2014), noting that in MZZM the Federal Circuit Court said that the Tribunal was obliged to assess relevant fear of the secondary applicant even though the secondary applicant submitted a Form D. The representative submits the applicant's statement mentions his child would be targeted and kidnaped to extort money in India. The representative attached copies of the following articles in support of the submission: an article by Khadija Ejaz, *Rise In Kidnappings in India* dated August 2011;an article from the Asia Times online *Kidnapping, India's new growth Industry*, dated January 24 2007; an article by CD Network *NRI's kidnap helps police bust extortion gang Five persons arrested* dated 23 December 2012; articles from the Times of India: *2 Held for kidnapping, extortion*, dated August 12 2015, *Shekhawati region turning into a den for extortion gangs,* dated Mary 9 2015, *Extortion stain on Delhi Police, two cops face probe*, dated September 2014, *Santosh Shetty likely to walk free as victims fail to identify him in kidnapping and extortion case*, dated November 12 2014; an article from the Press Trust of India *Case against 3 cops for extorting money from NRI,* dated February 7 2015, an article from the Hindustan Times *Gujarat police seek custody of former Chhota Rajan aide,* dated November 23 2010, and a copy of an article from The Mirror newspaper *Fears wealthy hotel boss has been kidnapped and killed on business trip to India,* dated 20 may 2015.

18. On 29 September 2015 the Tribunal received from the representative a copy of an email of the same date sent to the representative from the applicant responding to some of the issues raised during the hearing. In summary the applicant states that it has been a long time since he left India and the things that happen to him and his wife. He was nervous, scared and stressed thinking about having to return to India with his wife and [child], because he does not want to live as he has in the past in India. Since he left India he has lived in the little town of [name deleted] in Australia and nearly forgot his past and was thinking of the big future for his family especially his [child], growing up in the local community and enjoying [school] and freedom without fear. The applicant apologises for the few mistakes he made during the hearing and provides further information on a number of the issues raised, which the Tribunal has considered in more detail below. In conclusion the applicant states his past has been full of persecution and threats of killing and he does not want his [child] to face all those problems. He wants to keep his [child] away for his past life and wants his [child] to have the best life in Australia with full opportunities to [develop]. The applicant states his [child] was born in Australia, and he wants [the child] to have the right to choose [his/her] future and freedom, and he requests the Tribunal to consider his [child]'s life as a first priority.

FINDINGS AND REASONS

19. The law which the findings below refer to is attached to this statement of decision and reasons.

Nationality

20. On the basis of the applicants' consistent information provided to the Department and Tribunal about their family composition and citizenship of India, and the copies of their Indian passports and the third named applicant's birth certificate, provided to the Department, the Tribunal finds that the first and second named applicants are married and are the parents of the third named applicant who was born in [date]. The Tribunal also finds the applicants are citizens of India. There is nothing in the evidence before the Tribunal to suggest that the

applicants have a right to enter and reside in any country other than India. Therefore the Tribunal finds that the applicants are not excluded from Australia's protection by subsection 36(3) of the Act. As the Tribunal has found that the applicants are nationals of India, the Tribunal also finds that India is the applicants' "receiving country" for the purposes of s.36(2)(aa).

S.48A Bar

21. During the hearing the applicant confirmed he had initially visited Australia [in] November 2002, and then arrived [in] October 2006 on a subclass 676 visa and made his first protection visa application [in] November 2006. That application was refused [in] January 2007 and the Refugee Review Tribunal (RRT) affirmed that decision on 12 April 2007, and subsequent applications for judicial review and Ministerial Intervention were unsuccessful. The applicant confirmed he made his second protection visa application [in] July 2013 and included his wife and child (the second and third named applicants) as members of the same family unit who do not have their own claims for protection.

22. While the Tribunal acknowledged it had jurisdiction to review the decision in relation to the complementary protection criterion in s.36(2)(aa), it discussed with the applicant and his representative whether the Tribunal had jurisdiction to review the decision in relation to the Refugee Convention referred to in s.36(2)(a). The representative referred the Tribunal to the opinion of special [council] provided to the Tribunal prior to the hearing.

23. The Tribunal has taken into consideration the representative's cover letter to the Department enclosing the current visa application forms for lodging, dated [in] July 2013. The letter addresses the operation of s.48A, and notes the applicant's previous protection visa application was assessed under the Refugee Convention, and submits the applicant's claims have never been assessed under the complementary protection criteria. The letter submits s.48A only prevents an application made now if the grounds relied on were available in the past. It submits that s.48A does not prevent an application being made now in reliance on the complementary protection grounds if a prior application was made and finalised before those grounds were available for consideration.

24. The Tribunal has also taken into consideration the written Memorandum of [Advice] dated [November] 2014. The advice notes the Court in *SZGIZ* reasoned:

> Consistently with the individual operation of each of the criteria by reference to which an "application for a protection visa" is defined in s 48A(2), we see no basis for a construction which prevents a person such as the appellant from making an application based on a criterion which did not form the basis of a previous unsuccessful application for a protection visa by him.

25. In summary the advice states that it is clear s.46 does not contemplate an application for a visa being partially valid and partially invalid, nor should the Federal Court's judgment create such a distinction. Provided a subsequent application raises a previously unconsidered criterion, then the application is fully valid. The advice notes the structure of Part 866 of Schedule 2 to the Regulation requires the applicant to make one of four types of claims at the time of application, and submits that nothing in the language of the regulation suggests that an applicant must rely on only one of the four types of claims. The advice submits that at the time of decision the Minister (hence the Tribunal) must be satisfied that one of the four criteria is satisfied, and while those four criteria reflects the four types of claims in the time of application criteria, there is no restriction on the decision maker limiting their consideration to only those types of claims raised at the time of application. If a person makes an application for a Class XA visa which is not rendered invalid by any provision of the legislation, including s.48A, then the decision maker must decide whether or not they are satisfied of any of the

time of decision criteria in Part 866, regardless of the basis on which the application was originally made. Any other approach would be contrary to the objective of the legislation and would represent a failure of jurisdiction for the purposes of s.65 of the Act.

26. The Tribunal does not accept the written advice. The Tribunal notes that s.48A imposes a bar on a non-citizen making a further application for a protection visa while in the migration zone in circumstances where the non-citizen has made an application for a protection visa which has been refused. The Full Federal Court in *SZGIZ v MIAC* (2013) 212 FCR 235 has held at [38] that the operation of s.48A, as it stood at the time of this visa application, is confined to the making of a further application for a protection visa which duplicates an earlier unsuccessful application for a protection visa, in the sense that both applications raise the same essential criterion for the grant of a protection visa.

27. On the evidence before it the Tribunal finds the applicant made his first protection visa application [in] November 2006 and that application was refused [in] January 2007 with reference to the Refugee Convention criterion, and prior to the commencement of the complementary protection provisions on 24 March 2012.

28. Applying the reasoning in *SZGIZ v MIAC* (2013) 212 FCR 235, the Tribunal finds that it does not have power to consider the Refugee Convention criterion in s.36(2)(a), and has proceeded on the basis that it can only consider the applicant's claims in relation to himself under the Complementary Protection provisions in s.36(2)(aa) of the Act.

29. The Tribunal has also considered the issue raised by the representative, that the applicant has made a separate claim on behalf of his [child], the third named applicant, in his visa application form, which states that because the applicant has stayed in Australia for a considerable period, the criminal elements associated with the anti-BJP parties will perceive him as a person with wealth and target him and may abduct his child to extort money from him.

30. During the hearing the Tribunal noted that departmental records indicated the third named applicant had made a protection visa application in October 2012 which was refused by the Department. The applicant confirmed that an application for protection for his [child] was made in 2012. The representative noted that the delegate's decision record for the decision currently under review refers to the applicant's [child]'s protection visa application from 2012. The representative noted the decision record referred to upheaval in the [child]'s life, but questioned whether the claim that the [child] may be abducted to extort money from [the] father had been raised. The Tribunal discussed the claim that the third named applicant may be abducted to extort money from the applicant, with the applicant and the second named applicant. The applicant told the Tribunal he fears what happened in the past, and that they have lived in Australia without fear and in freedom, and he does not want his [child] to live in fear and wants [the child] to live without fear and in freedom and get a good education in Australia. On questioning the second named visa applicant did not wish to add anything further to what the applicant had said.

31. The Tribunal has taken into consideration the representative's post hearing submission and *MZZM v Minister for Immigration & Anor and MZAFB v Minister for Immigration & Anor* [2014] FCCA 2665 (19 November 2014) referred to. The Tribunal notes that case was similar to the application before the Tribunal in that it dealt with the an application for protection made by a father who included his wife and child as members of the same family unit who did not have claims for protection of their own. The Tribunal accepts the Federal Circuit Court found in that case that the applicant father had also made claims on behalf of his wife and child and that the Tribunal fell into jurisdictional error when it failed to consider those claims. Nevertheless, the Tribunal also notes the circumstances of the applicants in *MZZM v Minister for Immigration & Anor and MZAFB v Minister for Immigration & Anor*

[2014] FCCA 2665 (19 November 2014) where different to the application before this Tribunal, in that the secondary applicants (the mother and child) had not previously made an application for a protection visa themselves, and therefore the decision did not address the operation of s.48A in those circumstances.

32. As noted above s.48A, as it stood at the time of this visa application, bars people making a further application for a protection visa which duplicates an earlier unsuccessful application for a protection visa, in the sense that both applications raise the same essential criterion for the grant of a protection visa. Based on the departmental records the Tribunal finds the third named applicant made an application for a protection visa in October 2012, which was refused by the Department on the basis that the third named applicant did not meet the criterion under subsection 36(2)(a) and 36(2)(aa). Therefore, in relation to the third named applicant, the Tribunal is restricted by s.48A to considering the third named applicant as a member of the same family unit who does not have [his/her] own claims for protection and the criterion in s.36(2)(c).

Credibility

33. During the hearing the applicant told the Tribunal he could speak and write English and had written his written statement himself, and his lawyer had helped him complete the visa application forms. The applicant told the Tribunal he understood the contents of the documents when he signed them and did not wish to add or make any changes to the documents.

34. The Tribunal discussed with the applicant his background in India, family composition, education and work history, as well as his political activities and the incidents that occurred to him, and the reasons why he left India and his fears of returning. The Tribunal also spoke to the second named applicant noting she had been included in the protection visa application as a member of the same family unit who does not have their own claims for protection. The Tribunal discussed with the second named applicant her relationship background with the applicant, her knowledge of his political activities in India, as well as what had occurred to them in India. The second named applicant told the Tribunal she did not know the applicant well prior to their wedding in 2005, and that she did not know about the applicant's political activities in India. The second named applicant told the Tribunal she did not know that much because at her place, people don't tell the ladies everything, and therefore she does not know everything.

35. During the hearing the Tribunal raised its concerns that the applicant's oral evidence was different to his written statement in relation to a number of critical aspects of his claims. The Tribunal also raised its concerns that the applicant was initially unable to tell the Tribunal the full name of the party his father was a member of. The Tribunal also raised its concerns that the applicant's oral evidence was different to his written statemen in relation to what happened between him and his business partner and to his business. The Tribunal also raised its concerns about the delay in the applicants' departure from India. The Tribunal finds the applicant is not a witness of truth and is not satisfied the applicant has told the truth in relation to critical aspects of his claims. While the Tribunal accepts the second named applicant has not been told very much, and therefore was not able to corroborate much of the applicant's claims, in so far as she did give evidence about an incident on a motorbike, given the concerns noted below, the Tribunal is not satisfied she has told the truth about that incident. The reasons for these findings are discussed below.

36. First, during the hearing the applicant told the Tribunal about his activities for the BJP. He told the Tribunal he helped with canvassing and campaigning and spoke to people about the BJP and took people to the voting booths. The Tribunal noted the applicant's written statement claims the applicant was handling the office of BJP in his area. The Tribunal

raised its concerns that the applicant had not mentioned this in his oral evidence. In response the applicant told the Tribunal he was handling the office, but he also had to go and explain to people what they were doing in the area, and in the office they just made the plan about what they had to do, and then they would go out and speak to the people about the plan of the BJP. On further questioning about what handling the office of the BJP meant, the applicant told the Tribunal all the guys informed the applicant about what they did, and he would organise everyone about what they had to do.

37. The Tribunal has also taken into account the applicant's post hearing email dated 29 September 2015 in which the applicant addresses this issue and indicates that he had been doing camping, canvassing and taking people voting, as well as being in charge in the local area and handling the BJP office, and that it is common for the person in charge to have more responsibilities.

38. The Tribunal is concerned the applicant failed to mention this role in his initial oral evidence. While the Tribunal has taken into account the passage of time, and the applicant's nerves and stress at giving evidence, as well as his nerves and stress caused by his concerns about the future for his family, the Tribunal does not accept this explains why the applicant failed to mention the role of handling the office of the BJP in his area, which as later explained by the applicant, involved organising everyone about what they had to do. In isolation, the Tribunal would not give this omission much weight. Nevertheless, in light of the other credibility concerns discussed below, the Tribunal considers this omission in the applicant's initial oral evidence reflects poorly on his credibility and the reliability of his evidence.

39. Second, during the hearing the applicant told the Tribunal he became involved with the BJP because his father was involved with the BJP, who was in collation with the NDA, and his father was a member of the NDA. On questioning, the applicant did not know what "NDA" stood for. Later in the hearing the Tribunal raised its concern that the applicant was not able to tell the Tribunal what "NDA" stood for. In response the applicant told the Tribunal NDA meant National Defence Academy. The applicant told the Tribunal his father was a member of the National Defence Academy. In response to questioning about why the applicant had not initially told the Tribunal that NDA meant National Defence Academy the applicant just nodded his head. The Tribunal also raised its concerns that the country information before it did not list the National Defence Academy as a party that has links to the BJP. The Tribunal noted there is country information that indicated the BJP was involved in an alliance known as the National Democratic Alliance (NDA)[1]. On questioning if the applicant wished to comment on this information he indicated he did not.

40. In his post hearing email the applicant states he made a mistake in the meaning of NDA because he was nervous and because he could not stop thinking about what was going to happen in the hearing as well as the future of his [child]. While the Tribunal has taken this into consideration, the Tribunal remains concerned the applicant was unable to correctly identify the political organisation or party or alliance his father belonged to, given the applicant's claims to have been interested in politics since his childhood, and his claims that he was handling the office of BJP in his area and was an active member of the BJP. The Tribunal considers this reflects poorly on the applicant's credibility and the reliability of his evidence.

41. Third, during the hearing the applicant told the Tribunal that his friend, who he was in business with, transferred documents to himself and took over their business, and that the applicant stopped working with him when that happened. The applicant told the Tribunal this happened before the kidnapping event in 2004. The Tribunal noted the applicant's written

[1] http://eci.nic.in/eci/eci.html; DFAT Country Information Report India 14 July 2015.

statement states his partner was greedy for money and trapped the applicant in a financial blunder with the help of the applicant's political enemies, and that it was published in the local newspapers, and that the business collapsed slowly. The Tribunal raised its concern that the applicant's oral evidence was different to his written statement. When asked if he would like to comment on this, the applicant indicated he did not.

42. In his post hearing email the applicant states his friend transferred all the documents with the help of the applicant's enemies and that it happened before the kidnapping and was reported in the local newspapers, and that the applicant did not give a satisfactory answer because of his fear of returning to India. While the Tribunal has taken this into consideration the Tribunal is not persuaded that the applicant's nerves or fear of returning to India, or the passage of time, explains why the applicant's oral evidence was different to his written statement. The Tribunal considers the difference between the applicant's oral evidence and his written statement reflects poorly on the applicant's credibility and the reliability of his evidence.

43. Fourth, during the hearing the applicant told the Tribunal about helping to campaign in an election in 2001 or 2002 and that stones were thrown during the celebration procession, and about being kidnapped in 2004. The applicant then told the Tribunal about one incident that occurred after that time and before he left India. On further questioning the applicant told the Tribunal nothing else happened. The second named applicant told the Tribunal she did not know the applicant well before they were married in 2005, and did not know about his political activity, but she did tell the Tribunal about one incident that occurred to them prior to leaving India. The Tribunal notes the first and second named applicants gave generally similar evidence in relation to the one incident that occurred to them prior to leaving India. The first and second named applicant's both told the Tribunal that they were travelling to a friend's home when they were both knocked off their motorbike and injured, and received treatment in hospital, and that they then moved to the second named applicant's father's home for some time before returning to their own home. The second named applicant could not recall when this incident occurred. The first named applicant told the Tribunal this incident occurred at the end of 2005 or start of 2006.

44. The Tribunal raised its concerns that the applicant's written statement indicated that two incidents occurred after the kidnapping. According to the written statement, a couple of months after the kidnapping, while the applicant was coming home from his business office, he was waved down by some people, and the applicant stopped his vehicle and he was then attacked. His attackers ran away before he could recognise them, and his family members came and took him to hospital, and he made a complaint to police but was not sure who attacked him so the police found it difficult to search for those people. The statement states that six months after that incident, the applicant and his wife were riding the applicant's motorbike coming from his relatives place back to his home, when the applicant realised he was being chased by a vehicle that overtook him and threw some kind of explosive thing towards the applicant, but due to the speed of the bike the applicant and his wife saved their faces, and his wife screamed and was injured a little. The written statement indicates the applicant then drove fast to reach home, and that after that incident the applicant and his wife went to her father's home, who also became scared because the neighbours saw some unknown people asking about the applicant, so the applicant and his wife returned home, and the applicant left his work for the political party and stopped going to his business.

45. The Tribunal raised its concerns that the first and second named applicants' oral evidence was very different to the written statement. In response the applicant told the Tribunal it had been so long he missed out some parts. The second named applicant did not wish to make any comment. While the Tribunal accepts the first and second named applicants have been in Australia nearly nine years and therefore a long time has passed since they were in India, and the Tribunal accepts that the passage of time can effect a person's ability to recall detail,

the Tribunal is not satisfied the passage of time and missing some parts explains the differences between the oral evidence and the written statement. The Tribunal notes the differences are more than mere detail, they involve the number of incidents, where they occurred, who was involved and what occurred afterwards. The Tribunal considers these differences reflect poorly on the first and second named applicants' credibility and the reliability of their evidence.

46. Fifth, in accordance with s.424AA the Tribunal put information to the applicant from the record of his interview with the delegate [in] July 2014. The information was that when discussing what happened on the motorbike the applicant told the delegate that someone threw acid at them. The Tribunal noted that the information was different to the written statement which states some kind of explosive thing was thrown, and it was different to the applicant's oral evidence that they were knocked off their motorbike with no mention of acid or explosives. The applicant chose to respond immediately and told the Tribunal it had been a long time and he was nervous and made a mistake in explaining it properly.

47. In his post hearing email the applicant indicates the applicant and his wife were on a motorbike and a few people were chasing them and threw acid but they saved themselves as the applicant sped up. They were knocked out/off and there was a crowd of people so the people who attacked them ran away. The applicant states he did not explain this properly during the hearing. The Tribunal notes the applicant's post hearing email is different to the written statement and the oral evidence given at the hearing.

48. While the Tribunal accepts the first and second named applicants have been in Australia a long time, and the Tribunal accepts that the passage of time can affect a person's ability to recall detail, the Tribunal is not satisfied the passage of time and nerves explains the differences between the information given by the applicant during his interview with the delegate, and the written statement and oral evidence. The Tribunal considers this difference reflect poorly on the first and second named applicants' credibility and the reliability of their evidence.

49. Sixth, during the hearing the applicant told the Tribunal he left India [in] October 2006. The Tribunal raised its concern that the applicant told the Tribunal that the incident on the motorbike happened at the end of 2005 or start of 2006, and that nothing else happened, yet the applicant did not leave India until October 2006. The Tribunal raised its concerns that such a delay could indicate the applicant was not in a rush to leave India or in fear for his safety at that time. The applicant chose not to respond to the Tribunal's concerns when given the opportunity.

50. In accordance with s.424AA the Tribunal put information to the applicant from departmental records which indicated his subclass 676 visa was granted [in] July 2006. The Tribunal noted that the applicant did not leave India until [October] 2006 and raised its concern that he delayed a number of months before he left India after his visa was granted, and that such a delay could indicate the applicant was not in fear for his safety at that time. The applicant chose to respond immediately and told the Tribunal he was involved in the BJP and tried to get BJP protection and when he could not he decided to leave the country.

51. In his post hearing email the applicant indicates he was taking the advice of his father and friend involved in politics, who wanted him for try for vip protection, and as he wanted to stay with his family and settle in India, he was waiting to get that, but had no luck, so had to leave India.

52. The Tribunal notes the written statement makes no mention of the applicant seeking BJP protection. Given the other credibility concerns noted above, the Tribunal is not satisfied the applicant has told the truth in relation to seeking BJP or vip protection at that time. On the

basis of the evidence before it the Tribunal finds the applicant was granted his visa [in] July 2006 and did not leave India until [October] 2006. The Tribunal considers the applicant's delay in leaving India reflects poorly on the reliability of his claim to have been in fear for his safety at that time.

Complementary Protection

53. For the reasons outlined above the Tribunal finds the applicant is not a witness of truth and it is not satisfied the first and second named applicant have told the truth in relation to critical aspects of the claims.

54. During the hearing the applicant told the Tribunal that since he arrived in Australia he has not had any involvement with the BJP. Given the credibility concerns outlined above the Tribunal does not accept the applicant was interested in politics since his childhood or that his father was involved with the BJP or the NDA. The Tribunal does not accept the applicant was an active member of the BJP or that he handled all activities in his area, or handled the BJP office in his area, or did any work for the BJP. The Tribunal does not accept the applicant helped his father and/or the BJP with campaigning and canvassing or arranged public meetings, or that the applicant had a leadership role or any role in electoral activities. The Tribunal does not accept the applicant came to the adverse attention of the opposition party or its supporters due to any political activity or imputed political opinion or for any other reason. The Tribunal does not accept the applicant was targeted or injured in a victory procession after an election.

55. While the Tribunal is prepared to accept the applicant had his own business in partnership with a friend, given the differences between the applicant's oral evidence and his written statement about how the business ended, the Tribunal does not accept the applicant's business partner trapped the applicant in a financial blunder with the help of his political enemies or that it was published in the local newspapers or that the business collapsed slowly.

56. Given the credibility concerns noted above the Tribunal does not accept the applicant was abducted in 2004 or that a couple of months after that he was attacked on the way home from his business office when he stopped his vehicle, or that he was subsequently taken to hospital by his family members and then made a complaint to the police. Nor does the Tribunal accept the applicant and his wife were knocked off his motorbike and injured and hospitalised, or had acid thrown at them while on their motorbike, or had some kind of explosive thing thrown at them. The Tribunal does not accept the first and second named applicant's moved to her father's home in order to avoid anyone or any danger. Given the above, and the delay in leaving India, the Tribunal does not accept the applicant was in fear for his safety at the time he left India.

57. The Tribunal does not accept the first or second named applicants were, or are, of any adverse interest to anyone in India.

58. During the hearing the Tribunal noted that in his visa application form the applicant stated that there is going to be a national election and Narendra Modi from Gujarat is going to contest in the election on behalf of the BJP, and due to that, Congress and its allies will target and harm BJP members and activists. The Tribunal noted the national election had been conducted and that Mr Modi was now the Prime Minister of India. On questioning the applicant told the Tribunal he does not have any concerns about this.

59. The Tribunal also noted the applicant's visa application form states that in addition, because the applicant had stayed in Australia for a considerable period, the criminal elements associated with the anti-BJP parties will perceive him as a person with wealth and target him

and may abduct his child to extort money from him. The applicant told the Tribunal he had left India a long time ago and he does not know what the circumstances are like there now, but recently he has seen on the news what happened in India and Gujarat and that the police were doing bad things to the people over there and therefore he fears returning. On questioning if the applicant can identify any country information or reports that indicate people who return from Australia to India after a long period are perceived as wealthy and targeted, the applicant told the Tribunal he did not. The Tribunal noted that general source country information indicated that India's economy has been growing for a considerable amount of time and the middle class is growing and many people travel in and out of the country regularly[2]. The Tribunal noted it was unable to find any country information that indicated people who returned to India after spending time in Australia were targeted, noting the DFAT Country Information Report *India* 14 July 2014 does not mention that people who returned from Australia to India were perceived as wealthy and were targeted for that reason. The representative referred the Tribunal to a number of articles which he later provided copies of after the hearing, as noted above. The Tribunal has taken these articles into consideration. The Tribunal notes the articles indicate that kidnapping for extortion is on the rise in India, and a number of the articles give examples of wealthy professionals and children being victims of this crime. While the Tribunal accepts kidnapping for extortion occurs in India, the information before the Tribunal does not indicate that people who return to India after spending a considerable amount of time in Australia are perceived as wealthy and are target, or that their children are targeted. While the Tribunal accepts kidnapping for extortion occurs in India, the Tribunal does not accept people who return to India from Australia are perceived as wealthy and specifically targeted. While there is some country information indicating corruption in the police force the Tribunal is not satisfied on the evidence before it that the applicant or his family would be targeted by police and finds the chance that the police will do bad things to them is remote. The Tribunal also notes the population of India is over 1.2 billion people and the Tribunal finds the chance of the applicant or his child being abducted for extortion is remote.

Conclusion

60. The Tribunal is not satisfied there is a real risk the applicant will be killed or kidnapped or suffer significant harm for any of the reasons he has claimed, if he were returned to India now or in the foreseeable future.

61. While the Tribunal accepts the applicants have been in Australia for a considerable amount of time, and the third named applicant has spent [his/her] whole life in Australia, and the Tribunal accepts a move to India will be challenging, the Tribunal notes the applicant has a Bachelor [degree] and has worked in India in the past as [occupation], and has been employed in Australia, and speaks and reads and writes a number of languages including English, and the Tribunal does not accept that the applicant would be unable to support his family and subsist in India, or that the challenges inherent in relocating to India amount to significant harm as defined.

62. Having considered the applicant's claims individually and cumulatively, for the reasons given above, the Tribunal is not satisfied there is a real risk the applicant will be arbitrarily deprived of his life; or the death penalty will be carried out on him; or that he will be subject to torture, or cruel or inhuman treatment or punishment; or subject to degrading treatment or punishment, if he is returned to India, now or in the foreseeable future.

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[2] United States Congressional Research Service, *India's New Government and Implications for U.S. Interests* , 7 August 2014, R43679 , available at: http://www.refworld.org/docid/540dad554.html; DFAT Country Information Report India 14 July 2015; UK Home Office, *Country Information and Guidance: India: Background information, including actors of protection, and internal relocation*, 6 February 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/402790/cig_india_background_2015_02_04_v2_0.pdf;

63. Accordingly, the Tribunal is not satisfied that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to India, there is a real risk he will suffer significant harm. Therefore the applicant does not satisfy the criterion set out in s.36(2)(aa) for a protection visa. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations.

64. While not raised by the applicant or the second named applicant or the representative in the hearing, for completeness sake, the Tribunal has considered whether any of the material before the Tribunal could be construed as a claim for protection by the second named applicant. For the reasons given above, the Tribunal does not accept the second named applicant was knocked off a motorbike with the applicant, or that she was injured or hospitalised, or moved to her father's home to avoid anyone or any danger. The Tribunal does not accept the second named applicant was or is of any adverse interest to anyone in India. The Tribunal finds the chance of her being perceived as wealthy and targeted for abduction and extortion in India, or harmed by the police, is remote. The Tribunal does not accept there is a real chance the second named applicant will suffer serious harm if she returned to India now or in the reasonably foreseeable future. Nor does the Tribunal accept there is a real risk the second named applicant will suffer significant harm if she were returned to India now or in the foreseeable future. The Tribunal is not satisfied there are substantial grounds for believing that as a necessary and foreseeable consequence of the second named applicant being removed from Australia to India, there is a real risk she will suffer significant harm. The Tribunal is not satisfied that the second named applicant is a person in respect of whom Australia has protection obligations.

65. The Tribunal finds that the first, second, and third named applicants do not satisfy s.36(2)(b) or (c) 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 Tribunal finds the applicants do not satisfy the criterion in s.36(2). As they do not satisfy the criterion for a protection visa, they cannot be granted a visa.

DECISION

66. The Tribunal affirms the decision not to grant the applicants Protection visas.

Chris Thwaites
Member 16 October 2015

ATTACHMENT - RELEVANT LAW

67. In accordance with section 65 of the *Migration Act 1958* (the Act), the Minister may only grant a visa if the Minister is satisfied that the criteria prescribed for that visa by the Act and the Migration Regulations 1994 (the Regulations) have been satisfied. The criteria for the grant of a Protection (Class XA) visa are set out in section 36 of the Act and Part 866 of Schedule 2 to the Regulations. Subsection 36(2) of the Act provides that:

> '(2) A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
>
> (aa) a non citizen in Australia (other than a non citizen mentioned in paragraph (a)) 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 non citizen being removed from Australia to a receiving country, there is a real risk that the non citizen will suffer significant harm; or
>
> (b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:
>
> (i) is mentioned in paragraph (a); and
>
> (ii) holds a protection visa; or
>
> (c) a non citizen in Australia who is a member of the same family unit as a non citizen who:
>
> (i) is mentioned in paragraph (aa); and
>
> (ii) holds a protection visa.'

Refugee criterion

68. Subsection 5(1) of the Act defines the 'Refugees Convention' for the purposes of the Act as 'the Convention relating to the Status of Refugees done at Geneva on 28 July 1951' and the 'Refugees Protocol' as 'the Protocol relating to the Status of Refugees done at New York on 31 January 1967'. Australia is a party to the Convention and the Protocol and therefore generally speaking has protection obligations to persons defined as refugees for the purposes of those international instruments.

69. Article 1A(2) of the Convention as amended by the Protocol relevantly defines a 'refugee' as a 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.'

70. The time at which this definition must be satisfied is the date of the decision on the application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288.

71. The definition contains four key elements. First, the applicant must be outside his or her country of nationality. Secondly, the applicant must fear 'persecution'. Subsection 91R(1) of the Act states that, in order to come within the definition in Article 1A(2), the persecution which a person fears must involve 'serious harm' to the person and 'systematic and discriminatory conduct'. Subsection 91R(2) states that 'serious harm' includes a reference to any of the following:

    (a) a threat to the person's life or liberty;

    (b) significant physical harassment of the person;

    (c) significant physical ill-treatment of the person;

    (d) significant economic hardship that threatens the person's capacity to subsist;

    (e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

    (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

72. In requiring that 'persecution' must involve 'systematic and discriminatory conduct' subsection 91R(1) reflects observations made by the Australian courts to the effect that the notion of persecution involves selective harassment of a person as an individual or as a member of a group subjected to such harassment (*Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 per Mason CJ at 388, McHugh J at 429). Justice McHugh went on to observe in *Chan*, at 430, that it was not a necessary element of the concept of 'persecution' that an individual be the victim of a series of acts:

> 'A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purposes of the Convention.'

73. 'Systematic conduct' is used in this context not in the sense of methodical or organised conduct but rather in the sense of conduct that is not random but deliberate, premeditated or intentional, such that it can be described as selective harassment which discriminates against the person concerned for a Convention reason: see *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at [89] - [100] per McHugh J (dissenting on other grounds). The Australian courts have also observed that, in order to constitute 'persecution' for the purposes of the Convention, the threat of harm to a person:

> 'need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution' (per McHugh J in *Chan* at 430; see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 233, McHugh J at 258)

74. Thirdly, the applicant must fear persecution 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'. Subsection 91R(1) of the Act provides that Article 1A(2) does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless 'that reason is the essential and significant reason,

or those reasons are the essential and significant reasons, for the persecution'. It should be remembered, however, that, as the Australian courts have observed, persons may be persecuted for attributes they are perceived to have or opinions or beliefs they are perceived to hold, irrespective of whether they actually possess those attributes or hold those opinions or beliefs: see *Chan* per Mason CJ at 390, Gaudron J at 416, McHugh J at 433; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

75. Fourthly, the applicant must have a 'well-founded' fear of persecution for one of the Convention reasons. Dawson J said in *Chan* at 396 that this element contains both a subjective and an objective requirement:

> 'There must be a state of mind - fear of being persecuted - and a basis - well-founded - for that fear. Whilst there must be fear of being persecuted, it must not all be in the mind; there must be a sufficient foundation for that fear.'

76. A fear will be 'well-founded' if there is a 'real chance' that the person will be persecuted for one of the Convention reasons if he or she returns to his or her country of nationality: *Chan* per Mason CJ at 389, Dawson J at 398, Toohey J at 407, McHugh J at 429. A fear will be 'well-founded' in this sense even though the possibility of the persecution occurring is well below 50 per cent but:

> 'no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation.' (see *Guo*, referred to above, at 572 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

Complementary protection criterion

77. An applicant for a protection visa who does not meet the refugee criterion in paragraph 36(2)(a) of the Act may nevertheless meet the complementary protection criterion in paragraph 36(2)(aa) of the Act, set out above. The Full Court of the Federal Court has held that the 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear' in the context of the Refugees Convention as referred to above (see *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 at [246] per Lander and Gordon JJ with whom Besanko and Jagot JJ (at [297]) and Flick J (at [342]) agreed). 'Significant harm' for the purposes of the complementary protection criterion is exhaustively defined in subsection 36(2A) of the Act: see subsection 5(1) of the Act. A person will suffer 'significant harm' if they will be arbitrarily deprived of their life, if the death penalty will be carried out on them or if they will be subjected to 'torture' or to 'cruel or inhuman treatment or punishment' or to 'degrading treatment or punishment'. The expressions 'torture', 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' are further defined in subsection 5(1) of the Act.