

1416987 (Refugee) [2016] AATA 3011 (6 January 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division
CASE NUMBER: 1416987
COUNTRY OF REFERENCE: India
MEMBER: Paul Windsor
DATE: 6 January 2016
PLACE OF DECISION: Melbourne
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection visa.

Statement made on 06 January 2016 at 12:41pm

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] September 2014.
3. The applicant applied to the Tribunal for review of this decision on 14 October 2014.
4. The applicant appeared before the Tribunal on 5 January 2016 to give evidence and present arguments. The hearing was conducted in the English language.

CRITERIA FOR A PROTECTION

5. 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.
6. 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).
7. 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.
8. 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').

Mandatory considerations

9. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal took 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.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The applicant claims to be a citizen of India who was born in [his home town and district], Punjab state India, on [date]. According to his Protection visa application he is of the Sikh religion and speaks English, Punjabi and Hindi. He departed India legally [in] December 2008 and arrived in Melbourne, Australia, [in] December 2008.

Summary of claims from the Protection visa application

11. The applicant's claims from his Protection visa application lodged [in] June 2014 (folios 18-22 of departmental file [number]) can be summarised as follows:
- He left India because he had a relationship with a girl from a different caste. She was from the Rajbut caste and he is from the Ramdasiya caste. Her family were extreme Sikhs and threatened to kill him. The Rajbut caste is extreme and very violent. All their community members wanted to harm him. Even though the relationship is over they still hold grudges and live by revenge. They are strict and very closed minded and ignorant.
 - He was verbally abused and sworn at which really affected him. He experienced psychological and physical harm. He was afraid to leave his home and was treated like a prisoner in his city.
 - He fears he will be beaten up, tortured and sworn at if he returns to India. He has been assaulted previously and was threatened by the brothers and men on many occasions that he would be killed if they see him. He may be punished by elders in the Rajbut community, then ridiculed for being different and tortured by the brothers and uncles of the girl and men from the Rajbut caste.
 - He does not think the authorities can and will protect him as the Rajbut caste have a lot of power in the Punjab region and in India and the government is 'extreme with religion' and protects the elders and men of the Rajbut caste who are wealthy, come from a wealthy village and have connections within the government and authorities.

Evidence from the hearing of 5 January 2016

12. At the hearing on 5 January 2016 the applicant indicated that he was born and grew up in the small village of [his home town] in [home district in] Punjab state in India. He completed [number] years of schooling in his home village of [his home town] and then completed his final [years] of schooling in the town of [Town 1], located about [number] kilometres from [his home town]. He then completed a [subject] degree at the [specified] College in [Town 1]. He thinks he graduated in [year], about [number] years before he came to Australia. He subsequently undertook a Diploma in [another subject] from an institution in Chennai. This course was of about 6 months duration but he only spent about a week in Chennai as the course was mostly delivered on-line. He did that course because he was thinking about going overseas. He then worked as [an occupation] for about 12 months in a small [business] in the very small village of [Town 2], which is about [number] kilometres from [his home town], prior to travelling to Australia.
13. The applicant claimed that while he was at college he formed a relationship with a girl who attended the same college. They did not live together but had a relationship for about two and a half years. The applicant claimed that this girl came from the village of [Village 3]

which is only about two and a half kilometres from [his home town], and that she was 10 months younger than him.

14. The applicant claimed that the girl belonged to a higher caste than him, that she was upper caste and he is from a lower caste, and that this caused a lot of controversy and fighting. He claimed that he and the girl wanted the families to agree to them marrying but both families were unhappy with the relationship.
15. He applicant claimed that the girl became pregnant. He indicated that he does not know whether she proceeded with the pregnancy as they never met again, they just spoke by phone a few times. He commented that he last spoke to her after he came to Australia, around February or March 2009, and that his friends had subsequently told him she has married. The applicant indicated that the girl's family found out he was trying to contact her and claimed that they threatened him not to try to contact her again.
16. The applicant stated that most of the girl's family were in [Country 4]. When he came to Australia, someone from her family came from [Country 4] and he and his girlfriend tried to ask whether they could marry. This is when everybody knew what was happening. He indicated he is not sure if her family was aware of the pregnancy.
17. The applicant commented that he came to Australia to settle down, get studies and then bring his girlfriend to Australia. When she got married to someone else he was shocked.
18. The applicant claimed that he is afraid that if he returns to India and goes back to the village there might be big trouble because there are big families and powerful people and he can get killed there. The Tribunal asked the applicant if anything had happened to him while he was in India and he replied 'no'. When the Tribunal asked the applicant why he thought something might happen to him now he replied that his girlfriend's family had called him when they got his number from her and had said to him that if he comes back they will be going to see him.

Findings and Reasons

19. The issues in this review are whether there is a real chance that, if the applicant returns to India, he will be persecuted for one or more of the five reasons set out in the Refugees Convention for the purpose of s.36(2)(a) of the Migration Act and, if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to India, there is a real risk that he will suffer significant harm for the purpose of s.36(2)(aa) of Migration Act.
20. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
21. On the basis of the copy of the applicant's Indian passport provided to the Department, the Tribunal accepts that the applicant is a citizen of India and that his identity is as he claims it to be. The Tribunal accepts that India is the applicant's country of nationality for convention purposes and is the applicant's 'receiving country' for complementary protection purposes.
22. The Tribunal considers that the applicant has concocted the key elements of his claims and that they are not true. The Tribunal does not accept that the applicant had a relationship with a girl from a higher caste while he was at college in India, that the girl became pregnant, or that the applicant has been harassed, abused or assaulted by members of the girl's family, or community, or caste as a consequence of such a relationship. Accordingly, the Tribunal does not accept that the applicant faces a real chance of persecution amounting to serious harm or a real risk of significant harm from family members of this claimed former

girlfriend, or members of her community or caste group, for the foreseeable future, should he return to India. The Tribunal has reached these conclusions for the following five reasons.

23. First, when the applicant sought Ministerial Intervention in October 2013, following a decision by the Migration Review Tribunal to affirm a decision by the department refusing the applicant a Student visa, the applicant made no mention of having concerns for his safety should he return to India. At the hearing, the Tribunal put to the applicant for comment, in accordance with the requirements of s424AA of the Act, the content of information he had included in a submission to the then Minister for Immigration and Citizenship, the Honourable [name] MP, in support of his request for Ministerial Intervention. The applicant was asked to comment on why this submission, received by the Minister's office [in] October 2013, made no mention of the applicant having fears for his safety in India because of his claimed relationship with a former girlfriend, and possible acts of retribution or revenge by her family and/or community members. The applicant commented that at that time he tried not to tell everything because of the shame it might cause his family and his concerns that it might damage his current relationship. He indicated that he was scared and confused. The Tribunal does not accept that, if the applicant held concerns for his safety in India, he would not raise them with the Minister in a Ministerial Intervention request. The Tribunal considers that the applicant could have done this discreetly without bringing the matter to the attention of his family and his current partner.
24. Second, when the applicant attended an interview with a departmental officer from the Community Status Resolution area [in] February 2014, four months before he lodged his Protection visa application, and was asked whether he has any concerns about returning to India, the applicant again made no mention of having concerns for his safety should he return to India. At the hearing, the Tribunal put to the applicant for comment, in accordance with the requirements of s424AA of the Act, elements of the departmental notes from this interview, in particular his recorded comments that he has concerns that his family spent a lot of money sending him to Australia and were already in financial trouble before they invested in his education, and his reported statement that 'Melbourne is nice, easy to settle down here for a better future'. The applicant was asked to comment on this and why he made no mention of having fears for his safety in India because of a claimed former relationship and possible acts of retribution or revenge by her family and/or community members. The applicant commented that he did not mention these matters because he was with his girlfriend that day. When the Tribunal asked him if he could have asked her to leave the room he commented that it was his fault that he did not do that. The Tribunal does not accept that, if the applicant held concerns for his safety in India, he would not raise them in an interview with the department where he was specifically given an opportunity to state whether he had fears about returning to India.
25. Third, the applicant delayed for over five years from when he arrived in Australia in December 2008, until June 2014, before lodging a Protection visa application. When asked by the Tribunal why he delayed applying if he had fears for his safety in India, the applicant indicated that he didn't want to involve family and his new girlfriend. He indicated that he wanted to keep the matter quiet and was afraid he and his new girlfriend might break-up. The Tribunal asked the applicant how long he had known his current girlfriend. The applicant responded that he had known her for three years. When the Tribunal asked the applicant why he had not raised these concerns before he met her, given he has been in Australia for over six years, the applicant commented that he was focused on settling things with his student visa so he could complete his study. The Tribunal does not accept these arguments and considers that, if the applicant had a genuine fear for his safety in India arising from incidents dating back to 2007-2009, he would have taken the opportunity to apply for a Protection visa well before June 2014.

26. Fourth, the applicant clearly indicated at the hearing that nothing had happened to him while he was in India. The Tribunal asked the applicant to comment on the inconsistency between this statement and what was included in his Protection visa application, where it stated that in India he had been assaulted, was afraid to leave his house, and had been threatened by the brothers of his claimed girlfriend. The applicant responded that his girlfriend did not have any brothers and the term was used to mean uncles and cousins. When asked by the Tribunal if he had been assaulted the applicant commented that he had been involved in a few college fights because his girlfriend had an ex-boyfriend. When the Tribunal suggested that this is very different to the village community and the Rajput caste members generally being opposed to him the applicant commented that when he dropped his girlfriend at her home in his car, the local villagers did not like that and there were arguments. Based on the applicant's clear comment at the hearing that nothing had happened to him while he was in India, and the clear inconsistencies between that statement and the claims made in the applicant's Protection visa application, the Tribunal concludes that the information included in the Protection visa application is not a truthful account of what happened to the applicant. The Tribunal does not accept the applicant's claims that he was threatened with death or physical harm, that he was verbally abused and sworn at, that he experienced psychological and physical harm, that he was afraid to leave his home, and that he has been assaulted previously and was threatened by 'the brothers' and men on many occasions that he would be killed if they see him.
27. Fifth, the applicant asserts that his claimed girlfriend became pregnant. However, at the hearing he was not able to say when this occurred or whether she continued with the pregnancy. He was not able to indicate to the Tribunal whether the girl's family were aware of the pregnancy and, if so, when they became aware of the pregnancy. He also was not able to advise the Tribunal when the girl's family became aware of the claimed relationship between him and the girl, other than to say that he thought they already knew about it while he was in India, but most of the girl's family were living in [Country 4] and it was only once the applicant had travelled to Australia that 'someone' came from [Country 4] and he and his girlfriend sought permission to marry, that everyone knew what was happening. Furthermore, the applicant did not include the claimed pregnancy in his Protection visa application. When the Tribunal asked the applicant when his girlfriend became pregnant he commented that it was in college time and the same year he came to Australia. When the Tribunal queried the applicant whether it was when he was still studying, and noted that he had indicated that he graduated in [year] and had spent 6 months doing a Diploma and then 12 months working as [an occupation] in a [business] before coming to Australia, the applicant commented that it was two years before he came to Australia. When he had been asked earlier in the hearing if his girlfriend had proceeded with the pregnancy, the applicant responded that did not know what she did as they never met after that, but just spoke on the phone some times. The Tribunal cannot reconcile these different accounts and considers that if the applicant had a girlfriend who had become pregnant while they were at college together, the applicant would be clearer about the timing of this event and would know whether she had carried the child to term or not. If the pregnancy occurred in 2007, there appears to be no reason why the applicant would not have had further direct contact with the girl up to his departure from India in December 2008, given the applicant claimed that they had sought permission to marry after his arrival in Australia in December 2008. In any event, the applicant indicated that he and the claimed girlfriend maintained phone contact up until February or March 2009. The Tribunal also considers that the applicant would have included something as significant as a pregnancy in his Protection visa application. Based on the applicant's vague and inconsistent evidence at the hearing, the Tribunal concludes that the applicant did not have a relationship while he was at college with a girl from a higher caste who became pregnant.
28. As the tribunal does not accept that the applicant had a relationship while he was at college with a girl from a higher caste who became pregnant, the Tribunal also does not accept that

he received threats over the phone from the family of this girl a few months after he arrived in Australia, and does not accept that the applicant faces any future risk of harm as a consequence of such a relationship.

29. As the Tribunal has found that there is not a real chance that the applicant would suffer persecution should he return to India, the Tribunal finds that the applicant would not require the protection of the authorities in India.

Does the applicant have a well-founded fear of persecution if he returned to India?

30. Having considered the applicant's claims individually and cumulatively, for the reasons given above, the Tribunal does not accept that there is a real chance that the applicant will suffer persecution amounting to serious harm, if he were to return to India, now or in the foreseeable future.
31. Accordingly, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).

Complementary protection

32. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative complementary protection criterion in s.36(2)(aa).
33. Having regard to the findings of fact set out above, the Tribunal also does not accept that, as a necessary and foreseeable consequence of the applicant being removed from Australia to India, there is a real risk that the applicant will suffer significant harm, now or in the foreseeable future. The Tribunal therefore is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
34. 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

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

Paul Windsor
Member