

1011616 [2011] RRTA 262 (6 April 2011)

DECISION RECORD

RRT CASE NUMBER: 1011616

DIAC REFERENCE(S): CLF2010/105415

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Sydelle Muling

DATE: 6 April 2011

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicants claim to be citizens of India. The first named applicant arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicants] April 2009. The second named applicant was born in Melbourne, Australia on [date deleted]. The applicants applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] July 2010. The delegate decided to refuse to grant the visas [in] November 2010 and notified the applicants of the decision and their review rights by letter [on the same date].
3. The delegate refused the visa application on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] December 2010 for review of the delegate's decisions.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to 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).
8. Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Migration Regulations 1994 for the purposes of the definition.
9. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

10. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to 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.
11. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
12. 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.
13. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
14. 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)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: 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.
15. 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. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
16. 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.

17. 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 persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. 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.
18. 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.
19. Whether an applicant is a person to 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.

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Department's file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
21. Only the first named applicant has made specific claims under the Refugees Convention, his child relying on his membership of the first named applicant's family. For convenience, therefore, the Tribunal will refer to the first named applicant as the applicant.
22. According to the protection visa application, the applicant is a Punjabi Sikh male born on [date deleted] in [District A] in India. He lived [in] Punjab from [his birth]. He received twelve years education and is fluent in Punjabi and Hindi. He was employed as a farm worker on his family farm [in] Punjab. The applicant departed India legally from New Delhi [in] April 2009. He was widowed [in] March 2010. The applicant's mother is living in India.
23. The applicant claimed that he left India in order to accompany his wife to Australia for the purpose of her tertiary studies. He fears if he goes back to India he will be killed by his deceased wife's family, specifically her brother. He will also be attacked by the Mahila Mandal Group which is a group of activist women who target alleged wife abusers and the Indian police will take him into custody and beat him. The applicant claimed that he is being blamed for his wife's death. He will be identified as a member of the following social groups; 'men who are alleged to be responsible for their spouse's death', 'people who have left India and come back home a failure' and 'people who had had bad luck and are therefore a spreader of bad luck' The applicant claimed that whilst this may be unusual in Australia, in India many people have a serious antagonism towards victims of bad luck. Many people will try to eliminate him in order to prevent his bad luck from spreading to them. The applicant claimed that the authorities will do nothing to protect him. Despite the assurances he had received from the Indian Consulate in Melbourne, he knows that the police and political authorities will combine to ensure he does not survive if he returns to India.
24. Attached to the protection visa application form were the following documents:

- Certified copy of the applicant's late wife's student identification card;
- Certified copy of a letter from [cemetery deleted], The Greater Metropolitan Cemeteries Trust dated [in] April 2010 confirming that the applicant's wife was cremated at [cemetery deleted] [in] April 2010;
- Certified copy of a certificate of cremation for the applicant's late wife;
- Certified copy of the applicant's late wife's death certificate;
- Certified copy of the bio-data pages of the applicant late wife's Indian passport;
- Certified copy of the second named applicant's birth certificate;
- Certified copy of the applicant's marriage certificate;
- Certified copy of the bio-data pages of the applicant's Indian passports; and
- Submission from the applicant's adviser which provided a background to the applicant's claims. It was stated that the applicant's wife took her own life in March 2010, while suffering from extreme depression, and that the applicant was being blamed by his deceased wife's family in India for her death. The applicant's wife's brother had made it clear that he will kill the applicant if he returns to India. In addition, it was submitted that the media in Punjab has expressed its extreme dissatisfaction with the applicant such that it appears likely that he will be hunted by the general populace if he were to return to India. The applicant's adviser contended that the applicant is a member of a particular social group, that being Indian expats who return home having been the victim of terrible luck abroad. He claimed he has been advised that antipathy towards such individuals is well known to all in India. The adviser argued that the applicant will be subject to a witch hunt and is at risk of suffering death as a result. He has also been advised that the second named applicant is at risk of similar retribution simply because he represents the ill luck of his mother.

25. [In] October 2010, the Department received two translations of articles which purportedly appeared in two Punjabi newspapers.
26. [In] November 2010, the delegate refused to grant the applicant a Protection (Class XA) visa. The applicant subsequently applied to the Tribunal [in] December 2010 for review of that decision.
27. [In] March 2011, the Tribunal received a submission from the applicant's adviser outlining the background of the applicant's case, the relevant issues and the applicant's membership of a particular social group of "Indian ex-pats who return home, having been the victim of terrible luck abroad".
28. The applicant appeared before the Tribunal [in] March 2011 to give evidence and present arguments. The Tribunal also received oral evidence from [Mr A] and [Mr B]. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
29. The applicant was represented in relation to the review by his registered migration agent.
30. The applicant stated that he was born on [date deleted] in [District A] in Punjab. He lived in a village called [village deleted]. He completed twelve years education and is fluent in Punjabi and Hindi. He worked as a farmer on his own land. He departed India legally [in] April 2009. At the moment he has no family in India as his mother is currently staying in Australia with him but before she came to Australia she was living in their village. His father and brother

passed away. He has aunts, uncles and cousins in India. His aunt, his father's sister, lives in [District A].

31. The applicant stated that he and his late wife were married [in] January 2009. It was an arranged marriage which both families accepted. He did not experience any problems with his wife's family prior to her death. The Tribunal asked the applicant when he and his wife decided to come to Australia. The applicant stated that his wife had already passed the IELTS exam when they were married so they decided to come to Australia after their marriage. They wanted a better life and future. His wife wanted to study further so she could provide a good future for their son. Both their families supported their decision to come to Australia.
32. The applicant stated that his relationship with his wife was very good when they came to Australia. They were living in [suburb deleted] in a house with other people. His wife was happy in Australia. The Tribunal asked the applicant if either he or his wife experienced any difficulties settling into life here. He stated not really but when their baby was born he had health problems and was required to stay in [Hospital 1] for one month and this upset both him and his wife. The applicant stated that both he and his wife and their families were happy when they became pregnant. His wife's health during her pregnancy was okay. After the birth of their son, his wife was depressed, worrying all the time about whether their son would be okay or not.
33. The Tribunal asked the applicant why he fears returning to India. The applicant stated that he is very scared because his in-laws have advertised in the newspaper and written to the Chief Minister saying that he murdered their daughter. The Tribunal asked the applicant what he fears will happen if he goes back to India. He stated that when this tragedy happened and he rang his wife's family to speak to them, they became furious and upset and went up to his mother and told her, if and when he returns to India, they would do the same to him. They abused his mother badly and threatened to kill him when he returns. He fears his wife's brother and her cousins will harm if he goes back. He stated that his wife's family have strong political affiliations. When asked what political affiliations his wife's family has, the applicant stated that his wife's family asked him to send his wife's body back to India and got [Mr C], a political figure, to fax the Indian High Commission with instructions that her body should be sent back home. He also claimed that his wife's family had approached a women's organisation called the Mahila Mandal asking them to protest against it and he should be called back to India and prosecuted. The family had lodged an FIR against him at the police station, asking for him to be brought back to India and when he returns he should be punished and sent to jail and if he is not, they will punish him themselves. The Tribunal asked the applicant how he learnt about what has happened in India since his wife's death. The applicant stated that he called his relatives there. Before his mother came to Australia for the funeral, his mother was so scared she would not stay at home because at night they would come and look for her. His mother sometimes lived with his aunty or other relatives; she tried to live in hiding. When asked which other relatives his mother stayed with, the applicant explained that what he was referring to were neighbours in his village.
34. The Tribunal asked the applicant why he believes his wife's brother and cousins or her family want to harm him if he returns to India. The applicant stated that it was because they kept saying he was the person who murdered their daughter. His wife had gone to India to attend his brother-in-law's wedding and her family said when she went back she was really happy. They accused him of being responsible for torturing her. Her family said she was not a person who would commit suicide and that he was responsible for his wife coming to that end and

was responsible for her murder. The applicant stated that his wife returned to India [in] January 2010 with the baby and stayed for just one week.

35. The Tribunal asked the applicant if he himself had any contact with his wife's family since her death. The applicant stated that he called them because he wanted them to come to Australia for the funeral but they abused him on the phone and threatened him. He sent them papers to come to Australia for the funeral and at first they did not agree and stated that they wanted his wife's body returned to India. The Indian community in Australia worked hard for his wife's family to come to Australia for the funeral and completed the papers and they agreed to come but did not board their plane in Delhi. The Tribunal asked the applicant if anyone from his wife's family came to Australia for the funeral. The applicant explained the Indian community in Australia sent his wife's family the papers again and spoke to them and then they came but they did not stay with him. Only his wife's mother came to Australia.
36. The Tribunal asked the applicant if his mother-in-law saw the death certificate or spoke to either the Australian authorities or Indian High Commission about his wife's death. The applicant stated that she spoke to the Indian High Commission as the High Commission was strongly urging his wife's family to come to Australia because they wanted the funeral to happen here. He did not speak to his mother-in-law at all when she was in Australia. She did not stay with him or talk to him at all. When he did try to talk to his mother-in-law she just started hurling abuse at him. His mother-in-law did not see his son when she was in Australia.
37. The Tribunal asked the applicant apart from his wife's family, including her brother and cousins, did he fear anyone else would harm him if he returns to India. The applicant stated he was scared of his brother-in-law and his wife's cousins because they can do anything to him. He is not scared of anyone else.
38. The Tribunal asked the applicant about the two articles he submitted from Indian newspapers. The applicant stated that he read the articles on the internet and printed them out and had them translated. When asked if he had a copy of the untranslated articles he found on the internet, the applicant indicated that he had provided them to his adviser.
39. The Tribunal noted that in both submissions to the Department and the Tribunal it was claimed that he believed the general populace would harm him if he returns to India. The applicant stated that his wife's village panchayat came to his village, on behalf of his wife's family, and spoke to the main people in his village and abused them very bad. They insisted that he should be brought back to India so they could punish him and send him to jail.
40. The Tribunal asked the applicant about his claim that he will be attacked by the Mahila Mandal group and how he had learnt that his wife's family had spoken to this particular group. The applicant stated that before the funeral, when his mother was in India, the Mahila Mandal people also came to his village looking for him. He is scared the Mahila Mandal women group could do anything to him because this group supports women and to them he is a criminal who murdered his wife and should be punished. The Tribunal put to the applicant, from the information it had seen, the Mahila Mandal Group or Mahila Vikas Mandal, is a women's development group; it is a village level forum for women to discuss their personal, social, political, spiritual and economic concerns. The Tribunal put to the applicant that there is nothing in the information available about this group to suggest it is a vigilante group who go around targeting wife abusers or men generally. The applicant stated that Mahila Mandal is a group for women and they can do anything; if they find out a man is abusing his wife they can do anything to him.

41. The Tribunal asked the applicant why he believes the Indian police will take him into custody and beat him. The applicant stated because his wife's family have filed a report against him and have particular associations as well, such as [Mr C]. Given his wife's family's connection with this political figure they can use this influence or pay money for anything to be done. The Tribunal put to the applicant that he has a death certificate which states that the cause of his wife's death was [details deleted] and he has claimed he has received assurances from the Indian Consulate in Melbourne so why would the police in India either arrest him or contribute to any harm he claims he may be subjected to. The applicant stated that he is very much scared, even now, because he recently had a conversation with his aunt who told him his brother-in-law and some other men were still looking for him and kept visiting at night time and looking around his house to see if he had come back. His aunt was told this information from his neighbours.
42. The Tribunal asked the applicant about any assistance or support the Indian consulate in Melbourne has provided him. The applicant stated that the Indian consulate only helped to organise the papers for his wife's family to come to Australia. The student association helped with the funeral and other things. The Tribunal asked the applicant if he was aware of any investigation by the authorities in India to confirm the cause of his wife's death. He stated no. He did not know if the authorities in India had been in contact with the authorities in Australia to confirm the circumstances surrounding his wife's death.
43. The Tribunal asked the applicant if he returned to India, could he not seek protection from the police or some other authority from the harm he fears from his wife's brother and her family. The applicant stated that he is very scared to go back. If he goes back and something happens to him, he has no elderly person above him, and two more lives will be wasted as his mother and son will have no-one to look after them. The Tribunal repeated the question. He stated that his wife's family are powerful in a way because they have political connections with people such as [Mr C] and some of their relatives are also involved in politics or have political connections so they can bribe the police or give money so that they can get anything done. The Tribunal asked the applicant what other political connections his wife's family has. He stated that he did not know very much but her cousins or some family have connections.
44. The Tribunal put to the applicant that from the evidence he had provided it appeared that the essential and significant reason his wife's family, in particular her brother and cousins, want to harm him is revenge as they hold him responsible for the death of their daughter and sister. The applicant confirmed that his wife's family just want to take revenge. The Tribunal explained to the applicant, as it had described at the beginning of the hearing, the Convention provides protection to people who fear persecution for one or more than one of the five reasons it had told him and from his evidence it appeared the motivation for the harm which he fears from his wife's family does not appear to be for one of those five reasons. The Tribunal noted that it has been raised in submissions on his behalf that he may be a member of a particular social group, in particular Indian expats who return home having been the victim of terrible luck abroad and asked the applicant what he fears may happen if he returns to India because of his membership of this particular group. The applicant stated that he did not understand. The Tribunal explained to the applicant again that it had been claimed that he belongs to a particular group of people described as Indian expats who return home having been the victim of terrible luck abroad. The Tribunal asked the applicant if he believes, as a member of this group of people, he would have any problems if he returned to India. He stated that if he goes back and something happens to him his child will be lost because there will be no-one to look after him. He has had a very hard life because he did not have his dad

so he knows how difficult it would be for his son if his wife's family did something to him or killed him.

45. The Tribunal asked the applicant if there was any risk to his son, either from his wife's family or anyone else, if he returns to India. The applicant stated that because his wife's family thinks that he killed their daughter, by killing his son they would remove his future generations. He believes his wife's family would kill his son as revenge. The Tribunal asked the applicant if his son may be harmed by anyone else, other than his wife's family. He reiterated that he is scared of his wife's family and the group that they belong to.
46. The Tribunal put to the applicant that if he continues to have a strong subjective fear of persecution from his wife's family, could he not relocate to another part of India, away from where his wife's family lives. The applicant stated that he lived only in his village with his mother and nowhere else in India and if he goes anywhere else they can find him. The Tribunal noted that the country information states that the law provides for freedom of movement and the government generally respects this in practice. Punjabi Sikhs are able to relocate to another part of India and there are Sikh communities all over India. The Tribunal highlighted the fact that he completed twelve years education, can speak Hindi as well as Punjabi, has experience working as a farmer in India and also working in Australia and although he has not lived anywhere else in India, he has shown himself flexible and capable by coming to Australia where he has no family or friends. The applicant stated that he cannot stay anywhere else because he is scared his wife's family can find him and kill him; they will finish the life of his son and mother.
47. The Tribunal asked the applicant about his son's medical condition. The applicant stated that when his son was born his blood sugar was very low and he was given medication. The doctors told them that [medical prognosis deleted]. The Tribunal noted that his son is now over the age of one and asked if his son shows any sign of [abnormality] as a result of being born with low blood sugar. He stated at the moment his son is okay and he can walk now. The Tribunal asked the applicant if his son currently receives any medical treatment or attention. The applicant stated that his son is still receiving treatment at [Hospital 1]. When asked what sort of treatment his son receives, the applicant stated that his medication has been stopped at the moment. The Tribunal asked the applicant if he has any medical reports or letters from his son's treating doctors regarding his condition. The applicant's adviser stated that they had sought medical reports from [Hospital 2] but had not received them as yet and wished to submit this evidence as soon as it is received. The applicant stated that he did not think his son would get the same treatment in India that he receives in Australia from [Hospital 1]. He did not think his son would get any treatment if they returned to India.
48. The Tribunal took evidence from [Mr B]. He stated that he has been a close friend of the applicant for the last two years. He did not know the applicant in India. [Mr B] stated that the applicant's wife committed suicide and his in-laws wanted him to bring her body back to India. His in-laws threatened the applicant in a newspaper article which appeared on the internet. His wife's brother and their village have political connections. He did not know what their political connections are. He read in the newspaper the name of the political people. [Mr B] did not know of any other threats made to the applicant apart from what he read in the two newspaper articles on the internet. The Tribunal asked [Mr B] what he believes will happen to the applicant if he returns to India. [Mr B] stated that he is from the same culture in India and his fear is that the applicant's wife's brother and other relatives may kill the applicant. The Tribunal asked [Mr B] why they would want to harm him given that

the death of his wife is obviously also very difficult for the applicant. He stated that they believe the applicant killed his wife.

49. The Tribunal asked [Mr B] about the notion of bad luck in Indian culture, particularly in the Punjab, and how the applicant's experience of what may be deemed to be bad luck may impact on him if he returns to India. [Mr B] stated that people in the Punjab believe too much in this type of thing. The Tribunal asked him what exactly do people in the Punjab believe in terms of luck. He stated that people go to witch doctors and they believe whatever they tell them. The Tribunal asked [Mr B] if a person experiences bad luck, what would other people think about their bad luck. He stated that he could not say; people believe in these things too much but he does not. People who see witchdoctors implement whatever they are told whether it is wrong or right. The Tribunal asked [Mr B] what would happen to the applicant if he returned to India given that the death of his wife could be considered bad luck. He stated that he was not sure but his in-laws and other people will certainly try to harm him.
50. The Tribunal asked [Mr B] about the applicant's son's medical condition. [Mr B] stated that he knew they were going regularly to hospital for medical appointments since his son was born and this is continuing. [Mr B] stated that he has known the applicant for the last two years and he is very honest. His fear is genuine.
51. The Tribunal took evidence from [Mr A]. He explained that when the applicant's wife died, the Indian High Commissioner wanted to help the applicant and she asked him to visit the applicant. When they saw in the press that the applicant's wife's family wanted her body sent back to India, as well as the applicant, and an ex-Minister emailed demanding the same, they knew that there would be a big disaster. He explained that the applicant's mother-in-law claimed that the applicant's dead brother had been bothering the applicant's wife and that was why she committed suicide. [Mr A] also explained that political people in India take advantage of situations such as this, for their interest and political gain. The applicant's adviser interjected to clarify that the cause of the applicant's bad luck was the applicant's brother's death at a young age which was believed to have been transferred to the applicant's wife at the burial of the applicant's brother. The Tribunal asked the applicant when his brother passed away. He stated his brother died a year before his marriage. [Mr A] claimed that the applicant's mother-in-law told him that the applicant's wife called her the night before she [died] to tell her what was happening. He tried to tell the applicant's mother-in-law that her daughter may have been suffering depression but she blamed the applicant for his wife's death, so his family are the murderers and that was why they wanted him to return to India with his wife's body.
52. [Mr A] stated that there were a lot of people involved with the funeral and it had to be postponed when the applicant's mother-in-law came to New Delhi and then refused to come. The applicant's brother-in-law also refused to come to Australia for the funeral. He stated that the Indian High Commission was under a lot of pressure as a result of the email from the Minister. It was decided by a number of organisations here in Australia that it would be best for the applicant, as well as the families, for the funeral to be held in Australia. This would also avoid fighting between the two villages. The applicant's mother finally agreed to come and was in Australia for a few days. She did not speak to the applicant and stayed with relatives.
53. The Tribunal asked [Mr A] how the Indian High Commission in Australia reacted to what happened to the applicant's wife and the support they provided the applicant. [Mr A] stated that the High Commissioner was very sympathetic and the Deputy High Commissioner

attended the funeral and he asked him to speak a few words. The applicant was not provided financial support by the High Commission but they had continuous contact with him from the time the applicant's wife passed away. The Deputy High Commissioner provided him with his direct number and told him to ring at any time and wanted to be kept up-to-date with the situation and their contacts in India. In regard to getting the visas for family to travel from India, the High Commissioner liaised with the Australian High Commission in New Delhi in order to organise the visas straight away.

54. The Tribunal asked [Mr A] who he believes the applicant would face harm from if he returned to his home in India. [Mr A] stated the political people in the village. He explained the MPs want the votes. Everyone thinks the applicant is a murderer and wants to take revenge from him. When the applicant's wife's village heard the news of his wife's death, the villagers got together and went to the applicant's village and his mother had to move from there. The applicant's wife's family lost their daughter so they want revenge for that and the witchdoctors have also told them that her death was linked to the applicant's dead brother. He understood the witchdoctors have put in the mind of the villagers that the applicant and his family through his dead brother are behind the death of his wife. In addition, the political people fuel these beliefs in an effort to create more votes.
55. The Tribunal asked [Mr A] what he believes would happen to the applicant if he returned to his home in India. [Mr A] stated that they will try to get the applicant. He also stated that the applicant's mother-in-law showed no interest in the applicant's son when she was in Australia for the funeral. The applicant would not be safe from the applicant's in-laws or the people from their village, as well as the political people who will use the situation for their own benefit. The applicant's adviser suggested that there are two parallel motivations; firstly revenge and secondly, the strong superstitious mania which is driving these people. He submitted while it is arguable that revenge is not a Convention reason, on the evidence of the witnesses, superstition is a very real and tangible factor in people's lives. [Mr A] stated that there is a lot of superstition in Punjab and people worship different people and things which are unbelievable. The people do not believe in justice or the system but pursue matters themselves. The Tribunal asked [Mr A] about the applicant's situation if he were to return elsewhere in India and not the Punjab and whether he would be pursued to other parts of the country. [Mr A] stated that they may not be able to go that far and know where he is but from what he understood the applicant's education and ability to survive with his child somewhere else is almost impossible due to unemployment. He also discussed difficulties the applicant may experience, particularly finding employment, because of his inability to speak English. In terms of character, [Mr A] stated that he found the applicant to be a quiet person. He is working and trying to learn English. He does not have much time to see anyone as he is looking after his child. He had asked the applicant if he drinks as it was mentioned by his mother-in-law but he stated he does not. [Mr A] stated that the applicant was a nice young man however he stressed he had met him in very difficult circumstances.
56. The applicant's adviser submitted in response to the delegate's doubt that the social group "men who are alleged to be responsible for the death of their spouses" is an identifiable group, there are alternative social groups such as men who have come back from overseas having not succeeded and people who have had bad luck put on them and carry the bad luck around with them and are therefore spreaders of bad luck. He submitted these are readily identifiable groups in India and it is understood from the community spokespeople that this is very real and will not be forgotten; the applicant's in-laws want to eradicate the applicant and his son. The adviser submitted that even criminal conduct can constitute persecution under

the Convention and referred to the decision in *Sarrazola*. He contended that even if the mob acted against the applicant in a frenzied attack, if it was done with the intention of destroying the carrier of bad luck, there is arguably a Convention reason. The adviser requested further time to submit evidence in relation to the applicant's son's medical condition and evidence of the comments made by [Mr C] demanding the applicant be returned to India with his wife's body. In concluding, the adviser submitted that the applicant was doing his best to survive in Australia in what can be described as a terrible situation. If he is allowed to stay he intends to study farming practices and in due course, when the danger has subsided in a few years, possibly return to India and take those skills back with him.

57. [In] April 2011, the Tribunal received a copy of the second applicant's medical records received by the applicant from Western Health under FOI.

COUNTRY INFORMATION

58. According to information from CORD, Mahila Mandal is a community based rural women's organisation. It is a village level forum for women to discuss their personal, social, political, spiritual and economic concerns. Since 1985, CORD Sidhbari has facilitated 568 Mahila Mandal with 22,415 members in 562 villages of 13 developmental blocks of district Kangra, Himachal Pradesh. CORD has also facilitated Mahila Mandals in Tamilnadu and Orissa under its comprehensive integrated rural development programme. In Tamil Nadu, CORD Siruvani has 4 Mahila Mandal & CORD Thamraipakkam has 4 Mahila Mandal. In Orissa, CORD Deuladiha has facilitated 16 Mahila Mandals and CORD Lathikatta is working with women through 81 SHG; Mahila Mandals are in the process of formation. Recently started CORD Centre at Gajpati in Orissa is in process of formation of new Mahila Mandals.
59. The objective of Mahila Mandal is:
- To enable women to unleash their innate potential, individually and ability to work collectively.
 - To provide a forum for rural women to discuss their personal, family, social, economic as well as spiritual concerns.
 - To comprehensively address issues like social justice, poverty, health, education, environment, and local self governance through the empowerment of rural women.
 - To make self dependent and wise decision makers by increasing responsibility and prioritizing issues using collective thinking.
 - To make women move from insecurity and instability to security and stability.
 - To sensitize women to their local issues.
 - Integration of every village women with Mahila Mandal for her self development and to make her aware of her rights so that she will make positive contributions towards the development of her village.
 - Comprehensive development of the village through village women.

- To examine avenues for women to stand on their own feet such as through Self Help Groups for micro-credit and community based livelihood. (http://cord.org.in/grfx/programmes/Detail-Mahila%20Mandal%20_Women%20Group_%20programme.pdf)

FINDINGS AND REASONS

60. The applicant travelled to Australia on a valid Indian passport and he states that he is a national of India. Therefore for the purposes of the Convention the Tribunal has assessed his claims against India as his country of nationality.
61. The Tribunal accepts that the applicant has a strong subjective fear of harm from his brother-in-law and other members of his wife's family. The Tribunal accepts that the applicant's wife tragically took her own life in March 2010. The Tribunal also accepts that the applicant's wife's family, particularly her brother, holds the applicant responsible for his wife's death and accordingly may seek to avenge her death. The oral evidence of the applicant and his witnesses suggests that the applicant's wife's family refuses to accept that the applicant's wife took her own life for reasons associated with depression and instead they blame the applicant for her actions. This has resulted in them accusing the applicant of mistreating or abusing his wife and essentially for murdering her, as evidenced in the two articles from local newspapers submitted by the applicant. In the context of strong feelings of grief, disbelief and denial, the Tribunal accepts that the applicant's wife's family believes the applicant has "murdered" their daughter and sister. The Tribunal accepts that despite both the Australian and Indian authorities confirming the applicant's wife's death was a suicide, her family continues to believe the applicant is guilty of killing his wife.
62. The Tribunal has carefully considered all the evidence before it and finds that the harm the applicant fears from his wife's family is motivated by their desire for revenge for the death of their family member. As discussed above, the Tribunal accepts that the applicant has been judged responsible for his wife's death by her family, whether that be through his mistreatment of her, as he has been accused of by his wife's family, or through superstitious beliefs that his dead brother's bad luck had been transferred to his wife, and as a result, they want the applicant punished. The Tribunal therefore finds that the essential and significant reason for the harm the applicant fears from his wife's family is retribution from him for his wife's death. The Tribunal does not accept that the applicant's wife's family's retaliation is linked with any of the five Convention reasons including particular social group or political opinion. The Tribunal accepts that the applicant's wife's family may have sought the assistance of [Mr C] to facilitate the return of her body to India. However, the Tribunal does not accept that any political connections the applicant's wife's family may have or use against the applicant brings the applicant's fear within the scope of the Convention.
63. The Tribunal has taken into consideration the evidence of [Mr A] regarding the harm he believes the applicant faces from political people in the applicant's wife's family village. The Tribunal notes that according to [Mr A], the actions of such political people in fuelling the desire for revenge is motivated by their self-interest in gaining more votes. Despite the applicant not expressing any similar fear from these political people, even if the Tribunal were to accept that this tragedy would be used by politicians for their own political gain, the Tribunal does not accept that the reason for the harm or conduct of the politicians is Convention related.

64. The Tribunal has also had regard to the claim advanced by the applicant's adviser that the applicant faces a real chance of persecution for reasons of his membership of the particular social groups "men who are alleged to be responsible for their spouses death", "people who have left India and come back a failure", "people who had had bad luck and are therefore a spreader of bad luck" and "Indian ex-pats who return home having been the victim of bad luck abroad". The meaning of the expression 'for reasons of ... membership of a particular social group' was considered by the High Court in *Applicant A*'s case and also in *Applicant S*. In *Applicant S* Gleeson CJ, Gummow and Kirby JJ gave the following summary of principles for the determination of whether a group falls within the definition of particular social group at [36]:

... First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A*, a group that fulfils the first two propositions, but not the third, is merely a "social group" and not a "particular social group". ...

65. Whether a supposed group is a 'particular social group' in a society will depend upon all of the evidence including relevant information regarding legal, social, cultural and religious norms in the country. However it is not sufficient that a person be a member of a particular social group and also have a well-founded fear of persecution. The persecution must be for reasons of the person's membership of the particular social group.

66. The Tribunal does not accept that bad luck is either a characteristic or attribute. However, even if it were to accept it as such, the Tribunal does not accept that people who have had bad luck are united as a group on the basis of this particular shared element and that this enables them to be set apart from society at large. Similarly, the Tribunal does not accept that "men who are alleged to be responsible for their spouses death" or "people who have left India and come back a failure" exhibit some common element which unites them and makes them a cognisable group within society. For these reasons, the Tribunal does not accept that the claimed fear of harm either from the applicant's family or from others in his wife's village who may wish to prevent the applicant from spreading his bad luck, is Convention related. Although the Tribunal accepts the evidence of the applicant's witnesses regarding the influence of superstition and witchcraft in Indian culture, particularly in the Punjab, the Tribunal places significant weight on the applicant's oral evidence in the hearing which demonstrated that he does not have a subjective fear of anyone other than his wife's family, more specifically his brother-in-law. The Tribunal therefore does not accept that the applicant has a Convention based subjective fear of harm from other villagers or the general public, as represented by his adviser and witnesses.

67. The Tribunal does not accept that the applicant will be attacked by the Mahila Mandal women's group as a suspected wife abuser or murderer. The Tribunal has taken into consideration the independent information regarding the Mahila Mandal women's group in India, which describes this group as a village level forum for women to discuss their personal, social, political, spiritual and economic concerns. The Tribunal does not accept on the basis of this information that the Mahila Mandal group operates as vigilantes, pursuing men who harm their wives. The Tribunal also found the applicant's evidence regarding this particular claim to be vague and lacking in detail. The Tribunal finds it somewhat odd that the Mahila Mandal group would come looking for the applicant at his village, at the behest of his wife's family, given they would know he was in Australia. The Tribunal therefore does

not accept that the applicant faces a real chance of persecution from this particular women's group on his return to India.

68. The Tribunal also does not accept that the applicant will be taken into custody and beaten by the Indian police. The Tribunal notes that the applicant has produced a death certificate which confirms the cause of his wife's death. The applicant has also claimed in his protection visa application that he has been provided assurances from the Indian Consulate in Melbourne and in these circumstances, the Tribunal does not accept that the applicant would be either harmed by the authorities in India or denied protection. The Tribunal has taken into consideration the article submitted by the applicant from [publication and date deleted] which provides that the applicant's mother-in-law has registered a case against the applicant, however the Tribunal notes the reported response of the police was that the matter was for the Australian police. The Tribunal does not accept, on the evidence before it, that the applicant will be targeted by the authorities in India for a Convention reason. Although the applicant and his witnesses have suggested that the applicant's wife's family has political connections which they may exploit in order to exact their revenge, the Tribunal found their evidence regarding these associations to be vague and lacking in detail. For the reasons provided above, the Tribunal does not accept the applicant would be pursued by the authorities if he returned to India, at the behest of his wife's family or otherwise.
69. The Tribunal therefore finds the applicant's fear of persecution from the family of his late wife is not Convention related. Nor does the Tribunal accept that any harm the applicant may face from villagers or other members of the public is Convention related. Similarly, the Tribunal does not accept that the applicant's fear that the secondary applicant may also be killed is Convention related. The Tribunal therefore finds that the applicant does not face a real chance of persecution for a Convention reason, now or in the reasonably foreseeable future, if he returned to India.
70. The Tribunal recognises that the applicant and his son have endured an extremely traumatic and tragic event with the loss of their wife and mother at her own hands. The Tribunal accepts that in these circumstances a lot of questions remain unanswered and the pain felt by those left behind may lead to recriminations such as those which the applicant has been subject to from his wife's family. The Tribunal has taken into consideration the medical records of the second applicant submitted following the hearing. The Tribunal accepts that the second applicant was born at term with significant problems with [medical details deleted] and that he was treated at [Hospital 1] for the hypoglycaemia. The Tribunal also notes that according to a letter dated [in] January 2010 written by a Consultant Paediatrician at [Hospital 2], an MRI was performed on the second applicant on day 8 and it showed diffuse changes because of the severe hypoglycaemia. An MRI was repeated [in] December 2009 and this showed most of the changes had been resolved. The doctor was hoping that there was no significant cerebral impact but stated that it should be monitored clinically. The Tribunal has perused all the second applicant's medical records and notes that there appears to be no discussion on the second applicant's current health condition, whether he is receiving medical treatment or his future prognosis. However, the Tribunal accepts that the second applicant has suffered significant health issues early in his young life. The Tribunal appreciates the extremely difficult time the applicants have experienced as a result of the shocking and terrible death of a loved one in the circumstances discussed above. The Tribunal's role is limited to determining whether the applicant satisfies the criteria for the grant of a protection visa. A consideration of their circumstances on other grounds is a matter solely within the Minister's discretion.

CONCLUSIONS

71. The Tribunal is not satisfied that any of the applicants is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

DECISION

72. The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.