

0902659 [2009] RRTA 777 (6 July 2009)

DECISION RECORD

RRT CASE NUMBER: 0902659

DIAC REFERENCE(S): CLF2009/2474

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Susan Pinto

DATE: 6 July 2009

PLACE OF DECISION: Sydney

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, who claim to be citizens of India, arrived in Australia [date deleted in accordance with s431(2) of the *Migration Act 1958* as this information may identify the applicant] November 2008 and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] January 2009. The delegate decided to refuse to grant the visas [in] March 2009 and notified the applicants of the decision and their review rights by letter dated [in] March 2009.
3. The delegate refused the visa application on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] April 2009 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.
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, which includes a copy of the delegate's decision record. The relevant evidence is summarised below.

Protection visa application

21. According to their protection visa application, the first and second named applicants are a husband and wife who were previously residing in Kerala, India. The first named applicant (hereafter referred to as the applicant) is aged 60 years. He indicated on the application form that he speaks, reads and writes English and Malayalam. The applicant is a Catholic and had 21 years of education and obtained qualifications in Engineering in India. The applicant indicated that he was employed as a businessman prior to leaving India.
22. The second named applicant (hereafter referred to as the applicant wife) indicated that she is a 50 year old woman who is also a Catholic. The applicant wife has had 16 years education in India and was a housewife prior to leaving India.
23. The third named applicant (hereafter referred to as the applicant daughter) is aged 24 years. She is also a Catholic and has had 18 years of education in India. She was employed as a Financial Manager prior to coming to Australia.
24. In a statement provided with the application, the applicant makes the following claims:
 - The applicant is an engineer and businessman. He is also a Christian from a moderate Christian family.
 - As the applicant grew up he witnesses "the social condition becoming more and more vitiated by communal and racist forces."
 - The applicant attended his local church every Sunday and donated money to charity work done by the local church.
 - The applicant became interested in politics whilst studying at College. The applicant was a member of the Student wing of the Congress and donated money to the Congress candidate.
 - The applicant had no intention of becoming a leader or improving his profile within the party, but he became well known to members of the opposition party (CPI(M)).

- In 2002, the applicant's business was doing well and he became the enemy of contractors who were CPI(M) party members and supporters.
- During the last election, the applicant was approached by CPI(M) leaders and asked to give donations. The applicant refused and reported the matter to the local police. The police took the matter seriously and made inquiries. This angered the local CPI(M) leader who threatened him with violence.
- The applicant was dragged out of his office and told to halt all political donations to the Congress party. The applicant was threatened and asked to give 10,00,000 rupees if he wanted to continue his business and was told not to report the matter to the police.
- The applicant was threatened that if he failed to meet their demands his daughter would be kidnapped. The applicant made 3 consecutive payments and did not report the matter to the police, but "failed to pay according to them".
- They created problems in the applicant's construction site with the help of a trade union leader, Mr M.M. Lawrence. The workers union influenced his workers to abandon his site and ask for unusual demands. This resulted in the applicant losing business and he became traumatised and had difficulty sleeping.
- The applicant was also subject to constant threats on the telephone and he feared that if he remained in India he would not be able to cope with the harassment and "torture" due to his fragile state of mind and health.
- The applicant wanted to save his daughter from the "thugs". [In] October 2008 they tried to kidnap his daughter, but with the help of other motorists she was able to escape. The applicant was threatened on the telephone not to report the matter otherwise they would kill his daughter.
- The applicant believes that there has been an increase in the number of attacks against Christians in Kerala and thousands of Christians have been forced to leave their homes due to racist and politically motivated attacks, including assaults, rape, arson, robbery and intimidation.
- The applicant fears for his own and his family's safety if he returns to Kerala. The applicant believes that if he returns to India, the CPI(M) will try to kidnap his daughter and will try to kill the applicant.
- The applicant believes that the Kerala police hesitate to take action against CPI(M) members and those who commit human rights abuses and rape, torture and killings of Christians.

25. Documents provided with the application included a Certificate of Registration relating to the applicant's business; bank statement for the applicant's business; statement in relation to the applicant's business indicating that the applicant is an Engineer and the Chief Executive of the business and employs office staff and unskilled and skilled workers; receipts relating to the business; certificate from the [city deleted: s431(2)] Traffic Police Station indicating that

a Honda scooter was hit by an Omni van and caused damages to the scooter; and a medical certificate relating to the applicant daughter, dated [in] October 2008.

Department interview

26. The applicant attended an interview with the delegate [in] February 2009. The interview was conducted with the assistance of an interpreter in the Malayalam and English languages. The Tribunal has listened to the Department's recording and a record of the interview follows:

The applicant confirmed that he is a Catholic from Kerala. The applicant was an Engineering Contractor prior to leaving India.

The applicant was employed in engineering projects. The Marxists wanted the applicant to employ their workers and he was threatened by the CPI(M) if he did not do so. This occurred between 2006 and 2008 and the applicant was also asked for money.

The applicant was the Chief Executive officer of [company name deleted: s431(2)] which began in 1999. The applicant is managing the company from Australia, but someone in India is looking after the day to day affairs. The applicant has financial commitments and needs to continue operating the company.

The applicant confirmed that he was associated with the student wing of the Congress Party but was not a 'strong member'. He donated money to the Congress Party in 2001 and 2006, during the election periods. The applicant was not an official member of Congress, but he voted for them.

The applicant confirmed that because he was operating in CPI(M) territory, he was asked to employ union people and to pay money to the CPI(M). The union people were supported by the government. The local CPI(M) became angry and threatened him with violence and demanded money. They ransacked his office and asked him to give them 10 *laks* in May 2008. They told him that he should not report it to the police because they threatened him and told him they would kill him.

When asked what happened with the union leader, M.M. Lawrence, the applicant stated that he is associated with the CPI(M). [Information deleted: s431(2)] and he told them about the applicant's activities. The applicant did not have any dealings with him. When asked why he mentioned him in his statement, the applicant responded that M.M. Lawrence is [information deleted: s431(2)] he knows all the timings and movements of the applicant's family and he reported these to others. He knows the applicant's daughter is working and know that his daughter comes to his house for lunch.

The delegate queried why they tried to kidnap his daughter. The applicant responded that they did that so he would give them money. They know that the applicant is very close to his daughter. When asked if he gave the CPI(M) any money, the applicant stated that he gave 25,000 twice and 50,000 in total to the CPI(M). The applicant gave it to the local leader, [name deleted: s431(2)], who was one of the leaders demanding the money.

The applicant was targeted because they know that if they create problems for him he would be unable to continue with his business. The applicant did not report the matter to the police, he only lodged an insurance claim for the vehicle.

The applicant confirmed that they telephoned him at home and in his office. They obtained the applicant's mobile telephone number and told him not to report to the police. The Union and the CPI(M) would also telephone him at home and threaten him with harm.

The applicant's son has remained in India and is currently staying with [information deleted: s431(2)].

The applicant has not suffered any harm as a Christian.

The applicant is aware that some other business people have been targeted and he was told by them that they should give them money. The applicant only sometimes employed the people whom he wanted them to employ.

When asked about the hospital report, the applicant stated that his daughter's shoulder was dislocated in the accident while travelling to the applicant's home. The applicant's daughter had worked in a bank in Kerala. She has completed an MBA and other qualifications.

When asked whether he had previously left India before coming to Australia, the applicant stated that he had not.

The applicant confirmed that he did not report the matter to the police because he was frightened. The applicant also confirmed that he did not have any involvement in politics in Kerala since his days as a student.

After a break, the delegate asked why the applicant could not return to India. The applicant responded that his family would have problems and is frightened his family will be harmed.

When asked when his problems began, the applicant stated that it was in about 2003

Application for review

27. The applicant appeared before the Tribunal [in] June 2009 to give evidence and present arguments. The applicant wife and daughter, although validly invited to appear before the Tribunal, did not do so. In such circumstances, the Tribunal has decided to exercise its discretion to proceed to a decision pursuant to s.426A without taking any further action to allow or enable the applicant wife and the applicant daughter to appear before it. The Tribunal hearing was conducted with the assistance of an interpreter in the Malayalam and English languages. The evidence is summarised below.
28. The applicant confirmed that he is currently residing in Australia with his wife and daughter. The applicant has 1 son, aged 17 years, who resides with [information deleted: s431(2)]
29. The applicant completed engineering qualifications in India. He was a businessman prior to leaving India. He commenced his business in 1990 and was mainly involved in interior decoration for houses. Since 2002, the applicant commenced doing contractor and construction work for houses. The business started with "humble beginnings" but grew and in 2007 and 2008 was doing well. The applicant employed approximately 100 people and also had other people employed as subcontractors. The business has employed a Project Engineer and Supervisor to manage the business whilst he is in Australia, but is in the process of "winding up" the business and has not taken on any new contracts since he decided to come to Australia. The applicant also does some work through the Internet from Australia. The

annual turnover of the applicant's business was approximately 5 million Indian rupees per year. The applicant agreed that it was a very profitable business.

30. The applicant wife was not employed in the business in India. The applicant daughter has an MBA and was employed in a bank as a Personal Business Executive.
31. When asked why he cannot return to India, the applicant stated that for the last few years he has had a "political threat" from the CPI(M) party. The applicant was an active member of the Student Congress between 1965 and 1975 whilst he was a student. When the applicant entered into the business trade he discovered that the trade unions interfere in the work place. This is condoned by the CPI(M) and because there is a political backing, the workers do not do their work. As a result of this, the applicant was reluctant to employ trade union persons, but there is a rule that if a workplace has a particular number of people, a certain amount of employees must be from trade unions. The applicant appeased the CPI(M) by giving contributions, but they were not satisfied and repeatedly asked for more funds. The applicant continued his contact with the Congress party and gave them donations anonymously in order to get their support. The CPI(M) continued to ask the applicant for enormous amounts of money and if he did not give that money they would telephone him at work and at home. The work that the applicant does is complicated and the antagonising parties interfered in order to create problems for the applicant's business and to allow his competitors to promote their businesses.
32. [In] October 2008, the applicant daughter was returning home from her lunchbreak when CPI(M) persons tried to kill her. The applicant had previously been told that if he did not give money to the CPI(M) they would try to kill his daughter. The applicant daughter was on a scooter and 2 persons who were driving a mini van attempted to hit her whilst she was on the scooter. The persons knew that his daughter would be at that particular spot at that time. The applicant daughter received some injuries and was taken to hospital by some persons from the Fire Brigade which was opposite where the accident occurred.
33. The applicant daughter later told the applicant that the 2 persons got out of their car and stood at the accident site and pretended to be passers by. When the applicant daughter was in the hospital someone called the applicant about half an hour after the accident occurred and told him not to report the incident to the police, or there would be further harm.
34. The Tribunal queried what the persons did after they hit the applicant daughter with their car. The applicant stated that the 2 people pretended to help the applicant daughter to make onlookers assume that they were not associated with the accident. The Tribunal advised the applicant that it would have been obvious that they were in the vehicle that had hit his daughter. The applicant responded that they wanted people to assume they had not done it wilfully. After receiving the telephone call, the applicant realised that the people from the Party were responsible for his daughter's injuries.
35. The applicant confirmed that the 2 people organised a 3 wheeler rickshaw and the fire brigade helped to take her to the hospital. They then used the applicant daughter's mobile telephone to call the applicant.
36. The Tribunal asked the applicant to clarify what had happened in relation to the incident with his daughter. The applicant confirmed that the 2 people were in a 5 seater omni van and deliberately hit his daughter who then fell off her scooter. The 2 people got out of their car as if they were onlookers and assisted his daughter to obtain a rickshaw taxi Officers from the

fire station then took her to the hospital. The Tribunal stated that it would have been obvious to everyone at the accident site that they were the people who had hit the applicant daughter. The applicant responded that there is a watchman in front of the fire brigade and he saw what had happened. The Tribunal queried why some action would not have been taken against the 2 persons if there was a witness to the accident. The applicant responded that when he had the hospital report, the people would have assumed he was going to make a report to the police. At the same time, he received a telephone call telling him not to report the incident to the police, otherwise there would be further problems for him.

37. When asked when he received the telephone call from the CPI(M) warning him not to report, the applicant stated that the accident happened between 1.30 and 2pm and he received a call between 5 to 6pm. The Tribunal stated that he had previously stated that he received a call about half an hour after the accident happened. The applicant stated that he received the first call about half an hour after the accident and the next call was made more forcefully later.
38. The Tribunal advised the applicant that the statement he had provided to the Department had a completely different account of the incident relating to his daughter. The Tribunal stated that his statement indicated that the persons tried to kidnap the applicant. The Tribunal read the applicant the relevant parts of his statement. The Tribunal also advised the applicant that the Tribunal has extensive information relating to India and advised the applicant that the CPI(M) has been the ruling party in India since 2006 and there is no indication that they act in the way claimed by the applicant. The Tribunal also advised the applicant that there is no reason for them to behave in such a manner given that they are the ruling party in Kerala. The Tribunal stated that there is extensive monitoring of India and it would expect that there would be reporting of extortion and violence by the CPI(M), the ruling party, if it behaved in the manner described by the applicant. The Tribunal advised the applicant that although it accepted that his daughter had an accident, it is difficult to accept that there is any political component and it appeared that he had attempt to manufacture a political aspect to the accident suffered by his daughter. The applicant responded that it was his initial impression that the accident had no political implications, but he received a call from the persons telling him it was politically motivated.
39. The Tribunal queried whether the applicant was aware of other people who were threatened or harmed for not providing money to the CPI(M). The applicant responded that he gave money to the Congress because he sympathised with them, and also gave money to the CPI(M) but they began asking for larger amounts of money and it was impossible for him to give those amount of money.
40. When asked how much money he gave to the CPI(M) the applicant stated that he gave twice at the rate of 2,500 rupees each. The applicant confirmed that he gave the CPI(M) 5,000 in total. The Tribunal stated that he told the Department that he gave them 50,000 rupees in total. The applicant stated that is the amount he gave to the Congress Party. The Tribunal advised the applicant that he was asked during the Department's interview how much he had given the CPI(M) and he had stated that he had given 25,000 rupees on 2 occasions. The applicant responded that the smaller donation was to the local leaders and the 50,000 was given to the higher leaders. The Tribunal advised the applicant that he had again changed his evidence on this issue and had stated earlier that was the amount he gave to the Congress Party. The applicant stated that he gave 50,000 rupees in 2 different election periods to the Congress Party.

41. The Tribunal again queried whether other business people were asked for money. The applicant responded that he understood that the CPI(M) was obtaining money from other business people but he has no direct evidence. When asked whether any of those persons were harmed for not assisting the CPI(M), the applicant responded that they create problems and this creates loss and discredit to their businesses.
42. The Tribunal stated that the applicant appeared to be a very successful businessman in Kerala and queried why someone in his position would not have been able to approach the police. The applicant responded that the influence of the CPI(M) on the police is so great that his complaint would be of no use. The Tribunal also stated that it found it difficult to believe that the ruling party would wish to alienate a person such as him who is a very successful businessman in his state. The applicant responded that it originates from pressure for the trade union people to employ their workers. If he employs such persons they would not do anything and the business would not be profitable.
43. The Tribunal queried when he was asked for money. The applicant responded that they ask for money anytime they feel like it and once they asked for 1 million rupees (10 *laks*). The applicant told them that 1 million rupees is an unimaginable amount and they pressured him and held him in his office. When asked when they asked him for 1 million, the applicant stated that it was about 2 years ago. They came to the applicant's office and they pulled him from his seat. They also ransacked his office. The applicant's staff assisted him and nothing further happened. The applicant confirmed that he could not remember the exact date, but believes it was around the Kerala election time in 2006. The applicant did not report the matter to the police because he was scared that if he reported it they would increase the harassment.
44. When asked whether there were any other approaches to him apart from that time, the applicant responded that whenever he went to the worksite if CPI(M) persons were there he would be asked for money. The Tribunal again queried whether, apart from the incident in 2006 at his office, whether they approached him directly at any other time. The applicant responded that they only approached him at the worksite but they did not ask for a large amount.
45. The Tribunal stated that he told the Department that his office was ransacked in May 2008 and he was asked to give 10,000 rupees. The Tribunal advised the applicant that what he had told the Tribunal was inconsistent between his interview and his statement to the Department. The applicant stated that in his statement 10 *laks* is equal to 1 million rupees and the amount in his statement is 10 *laks* and this equals 1 million rupees. The Tribunal stated that he told the Department that this incident occurred in May 2008. The applicant responded that he may have made a mistake and he believes it occurred during the election. The Tribunal queried why he would have made such a mistake. The applicant responded that maybe he was not thinking carefully.
46. The Tribunal asked the applicant whether there was anything further which occurred in India which he considers relevant. The applicant responded that there are problems for Christians, but it is not as serious for him as a result of his political problems. When asked whether he has ever suffered any harm in India as a result of his Christianity, the applicant stated that there are no serious problems in his area between Christians and others. The Tribunal advised the applicant that about 20 percent of people in Kerala are Christian and although there are occasional problems the majority of Christians have no problems and the police are willing to provide assistance to Christians. The applicant agreed with the independent information.

47. The applicant is frightened of returning to India because there is a threat to his family members. The Tribunal advised the applicant that it is required to put some adverse information to him and it may be information that it relies upon to affirm the decision under review. The Tribunal advised the applicant that he is entitled to comment on the information and to request a further opportunity to comment on the information. The Tribunal advised the applicant that the information relates to inconsistencies between the evidence he provided to the Department during the interview and his evidence at the Tribunal. The Tribunal discussed the following adverse information with the applicant.
- The applicant told the Tribunal that the incident relating to the ransacking of his office where he was asked for money occurred around the 2006 elections and they asked him for 1 million rupees. The applicant told the Department that this happened in May 2008 and it was 10,000 rupees that he was asked to give.
48. The applicant responded that in his written document it is 1 million and maybe he said by mistake that it was 10,000 rupees to the Department. If it was 10,000 rupees the applicant would have been able to give it without difficulty as it is a not very large amount.
- The applicant told the Department during the interview that he gave 25,000 rupees twice and he told the Tribunal that he gave 2,500 rupees twice.
49. The applicant responded that he gave 2,500 locally for saving certain problems at the worksite. The applicant gave 25,000 rupees earlier to the party.
50. The Tribunal advised the applicant that it may find he has not provided truthful evidence and it may find that the incidents he has referred to did not occur and may also find that he has not provided a truthful account of his reasons for leaving India.
51. The Tribunal again advised the applicant that he is entitled to comment on the information and is entitled to request a further opportunity to comment on it. The applicant requested further time and after some discussion it was agreed that the applicant would comment in writing by 30 June 2009.
52. The applicant responded to the invitation to comment pursuant to s.424AA on 26 June 2009. The applicant states the following:
- At the Tribunal hearing, the Tribunal referred to information relating to Christians in Kerala. The CPI(M) is always harassing minority communities like Muslim and Christian religions, even though the Christian community has improved education in the State;
 - During the last couple of years, the CPI(M), with the help of the student wing SFTI and the youth wing DYFI make violence and trouble for Christian managed educational institutions. The Tribunal will find such information on any website;
 - The party's strength is reduced and the percentage of votes they got in the state elections of 2006 can be compared to those in the recent elections in 2009;

- Most of the supporters of the CPI(M) are from an illiterate or labour class and “blindly listen” to the false promises of the party. The party uses people to make the life of other people miserable;
- The Ministers of the party and other leaders are highly corrupt and there was a power scandal in relation to contractors from the SNC Lavalin Company who got the contract of repair of a hydroelectric project in Kerala by bribing one of the ex Ministers of the CPI(M)
- If the applicant returns to India the CPI(M) will definitely make trouble and may even try to kill his family members.
- There are a few inconsistencies in dates and figures and this may happen to any human being and is quite natural. During the hearing, the Tribunal member made a mistake and read it as 10,000 *laks* rather than the written figure of 10,00,000 (10 *laks* or 1 million) which shows that even the Member can make a mistake.
- The political attitude of the CPI(M) may “well be studied again and my mistakes of differed dates and figures may be admitted as human errors”.

Independent evidence

53. The following information relates to the situation of Christians in Kerala and the political situation in Kerala.

Christians in Kerala

The Tribunal commented that in September 2006 the Department of Foreign Affairs and Trade (DFAT) provided advice to the Tribunal, sourced from two Kerala based human rights organisations, on “the relative safety of Christians in Kerala State”. These sources advised the New Delhi post that Kerala, though affected by “[s]poradic localised incidents of violence”, Christians in the state were “relatively safer than in other states since they constitute a significant segment of the state’s total population ... and are economically well placed (Department of Foreign Affairs and Trade 2006, DFAT Report 538– RRT Information Request: IND30502, 20 September).

The Tribunal indicated to the applicant that DFAT had recently provided the following update:

The Kerala police has been effective in tackling the isolated instances... of violence targeting Christians throughout the state. Christian groups freely hold meetings and functions throughout the state, an indication of the secure atmosphere ensured by the state police...

There have been isolated instances of violence against Christians, mainly targeted against some preachers who use extremely critical language against non-Christian gods, practices and faiths. There have been no such instances in the recent past, and where violence has occurred in the past, police have responded effectively in terms of implementing the law of the land (in some of these cases, the attacked Christian preachers have been visiting foreigners without permission to undertake religious activities, in such cases, these preachers have been deported)...

There have been no instances of violence against Latin Catholics (or any other Christian groups) by the Communist Party of India – Marxist (CPI-M) or associated Left Front groups. The CPI-M and its associate groups have had extremely violent confrontations with Hindu groups (described by some as right wing Hindu groups) but they have never targeted Christian or other non-Hindu groups. We note that the CPI-M is the dominant coalition partner in the Kerala state government (Department of Foreign Affairs and Trade 2009, *DFAT Report 978 – RRT Information Request IND34424* , 6 March).

54. An article from *Compass Direct* from March 2008 indicates that the current government of Kerala has had some disputes with the Christian community regarding religious studies in schools but the government in general has demonstrated that it does not target or seek conflict with the Christian community. The article also indicates that the state government has taken steps to ensure that Christians in Kerala can safely and freely practice their religion and express their views. The *Compass Direct* article states that “Christian leaders in Kerala complain that since the Left Democratic Front state government led by the Communist Party of India-Marxist (CPI-M) came to power in 2006, it has been trying to gain control over their educational institutions to promote atheism in the name of reforms”. However, the article notes that these conflicts over educational policies “come in contrast to the common ground that Christians and communists in India share: not only a united defense against the ideological enemy of Hindu nationalism (*Hindustan*), but concern for the poor” According to recent reports, the Kerala government offered to shelter 56 Christian refugees who fled to Kerala from Orissa, following an outbreak of anti-Christian violence in that state (Aurora, V. 2008, ‘Communist Rulers Target Christian Schools in Kerala, India’, *Compass Direct* , 4 March; Varghese, R. 2008, ‘Orissa Christians find shelter in Kerala state’, *Christian Today* website, 3 November <http://www.christiantoday.com/article/orissa.christians.find.shelter.in.kerala.state/21796.htm> .
55. Reports in the media also suggest that Kerala’s state government, a coalition group led by the by the Communist Party of India–Marxist (CPI-M), had undertaken to take action against anyone targeting Christians or Christian institutions (‘LDF govt. committed to peace in Kerala: CPI(M) Secretary’ 2008, *webindia123.com* , source: *United News of India* , 22 September <http://news.webindia123.com/news/articles/India/20080922/1059946.html> – Accessed 30 January 2009). The information also indicates that the strained relationship between the CPI-M government and the Latin Catholic Church relates to the CPI-M and the Latin Church leadership competing for the loyalties of the Latin Catholic voter; and that while the CPI-M movement has clashed with the leadership of the Catholic Church and with various organisation associated with the Catholic Church, the CPI-M has generally sought to get the support of the Latin Catholic voter (Rajeev, PI. 2008, ‘Holy war in God’s Own Country’, *Indian Express* , 8 January <http://www.indianexpress.com/news/holy-war-in-gods-own-country/259303/> – Accessed 6 January 2009).
56. The *Compass Direct* report which states that “Christians form close to 20 percent (6.05 million) of Kerala’s population of 31.8 million, with a segment within the state’s Christian community regularly voting for communist parties (Arora, V. 2008, ‘Communist Rulers Target Christian Schools in Kerala, India’, *Compass Direct* , 4 March) It also states that Christian festivals in Kerala are celebrated without incident by Christians and members of the wider Kerala population (for examples see: George, S. 2007, ‘Chill, cakes and carols...Kerala peeps up for Christmas’, *Hindustan Times* , 22 December <http://www.hindustantimes.com/storypage/Print.aspx?Id=f248dd19-7e01-462d-a74c-00ddb3727d6f> – Accessed 31 January 2009; and ‘Catholic Church celebrates Alphonsa’s canonisation’ 2008, *The Hindu* , 13 October

<http://www.hindu.com/2008/10/13/stories/2008101356541300.htm> – Accessed 27 January 2009.

57. The information from external sources also indicates that despite communal violence and tensions between religious groups in India, the authorities in the states with large Christian communities have in general been responsive to the difficulties of the Christian community and have demonstrated a willingness and ability to intervene when Christians require protection. The Tribunal referred to a *Times of India* article which reported that police tightened security at churches in Kerala during anti-Christian violence in September 2008 ('Conversion fire spreads to Kerala' 2008, *Times of India* , 17 September). The Tribunal noted that the government was creating a special branch in the security forces to guarantee adequate protection for the victims of anti-Christian violence ('Orissa, Hindu fundamentalists offer rewards for killing Christians' 2008, *AsiaNews* , 22 November <http://www.asianews.it/index.php?l=en&art=13824&size=A#> – Accessed 10 December 2008).
58. The BBC has described Kerala as "the cradle of Christianity in India" (Havilland, Charles 2002, 'India's Christians: Roots and disputes', *BBC News* , 25 December http://news.bbc.co.uk/2/hi/south_asia/2604455.stm - Accessed 1 September 2006) and *Frontline* described the Catholic Church in Kerala as "powerful" (Krishnakumar, R. 2007, 'Battle cry', *Frontline* , vol. 24, issue 15, 28 July – 10 August <http://www.hinduonnet.com/fline/fl2415/stories/20070810504103200.htm> – Accessed 10 December 2008).
59. The US Department of State 2008 *Country Reports on Human Rights Practices* , India, (Released 25 February 2009) at <http://www.state.gov> ; and UK Home Office *Country of Origin Information Report* (Released August 2008) at <http://www.homeoffice.gov.uk/rds/pdfs08/india-210808.doc> . indicate that in general the authorities in India intervene to prevent communal violence between religious groups and that citizens of India have access to a reasonable level of protection provided by the State.

The political situation in Kerala

60. Kerala's most recent state government elections took place in May 2006 and ended as a victory for the Left Democratic Front (LDF) coalition led by the CPI-M. The 2006 LDF coalition also consisted of: "Communist Party of India, Janata Dal-Secular, Kerala Congress-J, Revolutionary Socialist Party, Nationalist Congress Party, Indian National League [a Muslim based party], Kerala Congress-S and Congress-S" The victory of the LDF saw the Congress-led United Democratic Front (UDF) governing coalition removed from office. At this time the UDF coalition also consisted of: "Kerala Congress (Mani), Janathipathya Samrakshana Samiti, Kerala Congress (B), Communist Marxist Party, Revolutionary Socialist Party (Shibu faction) and Revolutionary Socialist Party (Babu Divakaran faction)" News reports have noted that the May 2006 state election result continued a trend wherein the Kerala electorate has swung back-and-forth between the LDF and the UDF at successive elections. A May 2006 *Rediff.com* report noted that: "The BJP-led National Democratic Alliance fielded candidates in all the constituencies; but they failed to make a mark". It is also worth noting that the INC and the CPI-M, though opponents in Kerala state politics, have until recently been partners at the national level, with the CPI-M supporting the Congress led national United Progressive Alliance (UPA) coalition. This partnership ended in June 2008 when the CPI-M, along with four other left wing parties, withdrew its support from the INC led UPA over the terms of a nuclear energy deal being negotiated with the

United States (for the composition of the coalitions in 2006, see: 'Kerala's political jigsaw, unravelling' 2006, *Rediff* website, 10 April <http://in.rediff.com/election/2006/apr/10pkerala.htm> –for an overview of the May 2006 state election results in Kerala, see: Muraleedharan, N. 2006, '2006: Political conflicts in Kerala', *Rediff.com*, 20 December <http://in.rediff.com/news/2006/dec/20year.htm> – Accessed 6 July 2007.

61. Extensive searches conducted by the Tribunal revealed no information in relation to extortion or violence conducted by members of the CPI(M) against business persons in Kerala.

FINDINGS AND REASONS

62. The applicants claim that they are citizens of India. Their passports, provided to the Department confirm that they are citizens of India. The Tribunal accepts, therefore that they are citizens of India and has assessed their claims against India as their country of nationality.
63. The applicant filled in Part C of the application form. The applicant wife and applicant daughter completed Part D of the application form. However, it is implicit in the claims made by the applicant that the applicant wife and daughter both claim to fear harm in India from the CPI(M) or associated persons, and claims have also been made in relation to Christianity. In these circumstances, the Tribunal finds the applicant wife and daughter made applications as refugees and their application should also be considered against the refugee criterion.
64. The applicant claims that he was required to give money to the CPI(M) and to employ CPI(M) workers. The applicant claims that as a result of his refusal to provide jobs and large amounts of money to the CPI(M), he and his family were threatened, his office was ransacked and he was manhandled by CPI(M) persons. He also claims that an attempt was made to kidnap/kill his daughter. The applicant claims that although he initially reported the CPI(M)'s attempts to obtain money, after they ransacked his office and demanded a large sum of money, he and his family were threatened with harm and he was too frightened to report the matter to the police. The applicant has also claimed that Christians are subject to mistreatment in Kerala.
65. The Tribunal is prepared to accept some aspects of the applicant's claims. However, in relation to his claims of threats and harm from the CPI(M) to either himself or his family, the Tribunal does not accept that this occurred and considers that the applicant has significantly embellished particular incidents in an attempt to create an adverse political profile for himself and his family. The Tribunal is not satisfied that the applicant has given a truthful account of his reasons for leaving Kerala and is not satisfied that the applicant, the applicant wife or the applicant daughter have ever suffered serious harm for reasons of their political opinion or imputed political opinion in India. The Tribunal is, therefore, not satisfied that the applicant or his family had or currently have any adverse political profile in Kerala such that they would suffer harm upon their return to Kerala. Nor is the Tribunal satisfied that the applicant or his family has previously suffered harm as a result of their Christian religion and is not satisfied that there is a real chance that they would do so in the future. The Tribunal's consideration of the evidence follows.
66. The Tribunal has first considered the applicant's claims relating to his Christianity. The applicant has claimed that he is a Catholic from a moderate family who has been involved in his local Christian community. The applicant has not claimed that he has suffered harm as a Christian in Kerala and told the Tribunal that the area in which he resides is generally safe for

Christians. He has, however, also claimed that there has been an increase in violence and police hesitate to take action against persons responsible for harming Christians. Although the applicant appeared to agree with the independent evidence (set out above) in relation to Christians in Kerala when discussed with him during the hearing, he has since provided a statement in which he claims that the CPI(M) interfere in education and harass Christian communities.

67. The Tribunal has had regard to the applicant's claims relating to the increase of the harassment of Christians in Kerala, but is not satisfied that the independent evidence indicates that the applicant or his family, who are moderate Christians who have had some involvement in their local Christian community, will suffer harm for reason of their Christianity upon their return to Kerala. The applicant's own evidence at the hearing is that the area he resides in is safe for Christians. Although the Tribunal accepts that there may be occasional attacks against Christians and also accepts that the current government of Kerala has had some conflict with the Christian community in relation to religious studies in schools, the Tribunal is not satisfied that there is any evidence that the attacks are in the nature of systematic and discriminatory conduct as required by s.91R(1)(c) or that the interference in religious education will result in serious harm to the applicant or his family. The Tribunal also considers that the independent evidence above indicates that there is a high percentage of Christians residing in Kerala (see the independent evidence above which indicates that Kerala has been described as the "cradle of Christianity in India") and Catholics are not commonly targeted by other religious groups or denied State protection in Kerala. The evidence further indicates that Christians in Kerala are able to freely practise their religion without adverse interference from other religious groups or the authorities. Thus, the Tribunal is satisfied, having regard to both the independent evidence and the applicant's own evidence whereby he has not claimed to have suffered harm in the past as a Christian, and his evidence that he lives in an area which is safe for Christians, that there is not a real chance that the applicant, the applicant wife or the applicant daughter will suffer harm for reasons of their Christianity if they returned to Kerala now or in the reasonably foreseeable future.
68. The applicant has also claimed that as a businessman he was required to employ CPI(M) workers and CPI(M) persons created problems for his business if he did not acquiesce. The Tribunal accepts that as a successful businessman employing some 100 people, the applicant may have been encouraged or asked to employ some CPI(M)/Union workers. The Tribunal also accepts that the applicant may not have wished to employ Union workers given his evidence at the Tribunal hearing that he considered it disadvantageous to his business to do so. The Tribunal also accepts that the CPI(M) may have been opposed to the applicant's unwillingness to employ their workers and that there may have been some friction between the applicant's business and those businesses with CPI(M) links. However, the applicant's own evidence at the hearing was that his business was flourishing in 2007 and 2008 and he had a profitable business and was a successful businessman in Kerala. The Tribunal is not, therefore, satisfied that the applicant's business suffered unduly as a result of the requirement to employ some Union workers, or that any resulting problems that the CPI(M) may have created caused the applicant's business to suffer such that the applicant or his family suffered serious harm in the sense required by s.91R(1)(b).
69. The applicant has claimed that as a result of his refusal to give increasingly large sums of money and to employ CPI(M) workers, he and his family were threatened and harmed. The applicant referred to 2 main incidents, the first of these being an incident whereby he was threatened, manhandled and his office ransacked, and another incident relating to an attack on

his daughter. The Tribunal does not accept these incidents occurred and considers that the applicant has manufactured these incidents. First, in relation to the incident whereby he claimed persons came to his office and ransacked his office and asked him for a large amount of money, the Tribunal accepts that the applicant told the Department at the interview that it was 10 *lacs* and accepts that it was mistaken about the amount of money when it was discussed with him at the Tribunal hearing. The Tribunal also makes no further adverse findings relating to any apparent inconsistencies between other amounts of money. However, the applicant claimed to the Department that this incident occurred in May 2008, whilst to the Tribunal he indicated that it was around the elections in 2006. The applicant has claimed that he made a mistake during the Department's interview and it had occurred around the 2006 elections. The Tribunal does not accept that the applicant made a mistake and that he would not recall when the incident relating to his office being ransacked and himself being manhandled by CPI(M) persons occurred.

70. The Tribunal further considers that the applicant's claims in relation to extortion attempts and threats of harm from the CPI(M) are not supported by the independent evidence. As discussed with the applicant during the Tribunal hearing, there is no evidence supporting his claims that persons who do not provide large amounts of money to the CPI(M) or employ CPI(M) workers are subject to threats, extortion or violence. The Tribunal considers that were the CPI(M), the ruling party in Kerala, operating in such a manner that there would be evidence of this in the extensive coverage of India by international and national news agencies. The Tribunal's extensive searches into this issue have revealed no such information. Thus, in combination with the applicant's inconsistent evidence to the Department and the Tribunal relating to this issue and the absence of independent evidence supporting the applicant's claims, the Tribunal does not accept that the incident whereby he claims to have had his office ransacked and to have been threatened and man-handled, occurred. Nor does the Tribunal accept that the applicant or his family were subject to other threats of harm on other occasions. Thus, although the Tribunal accepts that the applicant may have been asked to give political donations to the CPI(M), and that he did so at different times, the Tribunal considers that there is nothing unusual in political parties seeking donations from successful business people. As discussed above, given the applicant's own evidence that he had a profitable business which was thriving in 2007 and 2008, the Tribunal is not satisfied that any political donations that he gave to the CPI(M) resulted in his business suffering any undue harm.

71. The Tribunal also considers that the applicant has not been truthful in relation to the other main incident which he claimed occurred as a result of his refusal to provide money and positions to the CPI(M), being an attack upon his daughter. The applicant claimed in a statement to the Department that [in] October 2008 CPI(M) "thugs" tried to kidnap his daughter, but with the help of other motorists she was able to escape. By contrast, at the Tribunal hearing, the applicant gave an entirely different version of events, claiming that the applicant daughter was on her motorcycle when she was hit by 2 CPI(M) persons driving an Omni van. He claimed that those 2 persons attempted to pretend that they were innocent onlookers and assisted the applicant daughter to obtain a rickshaw so that she could be taken to hospital. The Tribunal is not satisfied that the 2 versions of the incident can be reconciled and is not satisfied that either of the versions claimed by the applicant occurred. Thus, although the Tribunal accepts, on the basis of the medical certificate and the insurance report, that the applicant daughter was involved in an accident requiring hospitalisation, the Tribunal does not accept that this had any political dimension. As discussed with the applicant during the hearing, the Tribunal considers it apparent that he has attempted to create a political

dimension to an accident suffered by his daughter. The Tribunal does not, therefore, accept that the applicant daughter was attacked or that there was an attempted kidnap by CPI(M) or associated persons.

72. The Tribunal has also considered the applicant's claims relating to his involvement in student politics. The applicant claims that in the 1970s, whilst a student, he was involved with the Congress Party and also gave donations to the Congress Party. The applicant does not claim, nor does his evidence establish, that he was subject to any harm at University as a result. The Tribunal is not, therefore, satisfied that applicant's involvement in student politics some 30 years ago would result in the applicant or his family suffering any harm in the future. The applicant's own evidence indicates that he has had no other direct involvement in politics since that time apart from voting for Congress and providing donations to Congress. The Tribunal accepts that he has done so but is not satisfied that voting or providing political donations to the Congress, a significant party which has either been in power or opposition in Kerala for some years, would result in the applicant being viewed with an adverse political profile.
73. The Tribunal has considered all of the evidence, including the documentation relating to the applicant's business and his daughter's accident as provided to the Department. The Tribunal has accepted that the applicant may have been asked to employ CPI(M) persons and also accept that he had some minor involvement in politics some 30 years ago. The Tribunal has considered that there is nothing unusual about a successful businessperson being asked to do so. The Tribunal has also accepted that as a person with a profitable business, the applicant was asked to make political donations, not only to the CPI(M) but also to the Congress Party. The Tribunal does not accept that such requests were in the manner of extortion or that the applicant or his family were ever threatened, or physically harmed or that his business ever suffered significantly as a result. The Tribunal has also considered the evidence relating to Christians in Kerala, but does not accept that the applicant or his family has been or will be the subject of harm for reasons of their religion. Accordingly, the Tribunal is not satisfied that there is a real chance that the applicant, the applicant wife or the applicant daughter will suffer harm in India now or in the reasonably foreseeable future for reasons of their religion, imputed or actual political opinion or for any other Convention reason. The applicants do not, therefore, have a well founded fear of persecution in India.

CONCLUSIONS

74. The Tribunal is not satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.
75. The applicant wife and daughter applied as members of the first named applicant's family. As the first named applicant does not satisfy the criterion set out in s.36(2)(a), it follows that the other applicants cannot satisfy the relevant criterion set out in s.36(2)(b) and cannot be granted the visa.
76. In respect of their own implicit claims, the Tribunal also finds that the applicant wife and daughter do not satisfy the criterion set out in s.36(2)(a)

DECISION

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

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the *Migration Act* 1958.

Sealing Officers ID: RCHADW