

071488576 [2007] RRTA 216 (19 September 2007)

DECISION RECORD

RRT CASE NUMBER: 071488576

DIAC REFERENCE(S): CLF2007/68176

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Ann O'Toole

DATE DECISION SIGNED: 19 September 2007

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**

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).

The applicants, who claim to be citizens of India, arrived in Australia and applied to the Department of Immigration and Citizenship for Protection (Class XA) visas. The delegate decided to refuse to grant the visas and notified the applicants of the decision and their review rights by letter.

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. The applicants applied to the Tribunal for review of the delegate's decisions.

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

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.

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 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).

Section 36(2)(b) provides as an alternative criterion that the applicant is a non-citizen in Australia who is the spouse or a dependant of a non-citizen (i) to whom Australia has protection obligations under the Convention and (ii) who holds a protection visa.

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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:

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.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* [1989] HCA 62; (1989) 169 CLR 379, *Applicant A v MIEA* [1997] HCA 4; (1997) 190 CLR 225, *MIEA v Guo* [1997] HCA 22; (1997) 191 CLR 559, *Chen Shi Hai v MIMA* [2000] HCA 19; (2000) 201 CLR 293, *MIMA v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, *MIMA v Khawar* [2002] HCA 14; (2002) 210 CLR 1, *MIMA v Respondents S152/2003* [2004] HCA 18; (2004) 222 CLR 1 and *Applicant S v MIMA* [2004] HCA 25; (2004) 217 CLR 387.

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.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

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.

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.

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.

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.

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.

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

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. The applicants are husband and wife. Their protection visa application was lodged on [stated date].

In answer to the question as to why the applicant husband left his country he stated:

"Applicant claims subject to persecution in the hand of non-private agents, "criminals, thugs, extortionists" as a result being "businessman" and the State

refused protection as a result of unwillingness to comply with the unlawful demand of bribes.”

Nothing further was provided by the applicants to the Department.

The Tribunal received a written request from the applicant to adjourn the hearing because he was trying to contact his migration agent and obtain a copy of his file. The Tribunal discussed this request with the applicant during the hearing.

Tribunal Hearing

The applicant husband attended the Tribunal. The applicant wife did not attend. An interpreter in the Gujarati language assisted the Tribunal.

The applicant provided his passport to the Tribunal and a copy was placed on the Tribunal file. His passport was issued in Year 1. The applicant arrived in Australia in Year 2.

I asked the applicant why he requested an adjournment of his hearing. He replied that he had not received what his story was and his adviser had not sent him any documents. He stated that he had no documents from his country. I asked the applicant what documents he had received. The applicant handed up to the Tribunal the documents he received and those included a copy of the Tribunal file and a copy of the Departmental file. I mentioned to the applicant that he had been provided with all of the documents that were available. I informed the applicant that it was the Tribunal’s intention to discuss his application with him.

The applicant then handed up a two page document signed by the applicant and his wife. He stated the document contained his claims for protection. I asked the applicant if the document contained all the information regarding his claims and he replied “yes”. The document read as follows:

- *“I left my country because of fear of life. We are [manual workers]. [Family Member M] is very well known leader of the Bharatiya Janta Party (BJP). Most of the Hindu people living these area are the supporters of Hindu parties and Hindu Organisations. Such as Bajarang Dal, Rastryia Swang Sevak Sangh and Shiv Sena. These Hindu organisations protect their life of the Hindus at the time of Hindu-Muslim riots.*
- *Gujarat was very peaceful state before Godhara Incident of 2002. My area [Area A] where we live was very safe and peaceful. After 2002, Hindu-Muslim riots spread all over Gujarat. My area [Area A] was badly affected by the Muslim-Hindu riots. In that Muslims-Hindu riots of 2002, more than 60 people injured. Nearly 15,000 Muslims live around my area. They are very violent, aggressive and united. They have latest weapons. Whenever they hear any news of riots in any area, they become ready and equipped with weapons to fight with the Hindus.*
- *In the last riots, our family members suffered because of my and my family members’ involvement with the BJP Party. I am member of the BJP. In the last election of Legislative Assembly of Gujarat I took active part in*

organising meetings and gathering people in support of the BJP candidate [Person X].

- *I became target of the local Muslim leader [Person L]. In the last election, the BJP candidate won the election. After election the Muslims who were supporting Congress Party candidate became more violent and aggressive towards us and gave warnings and threatening. They wanted to kill our village leader [Person V].*

- *They, (Muslim-Group) attacked and many Hindu leaders. Their family members were stabbed to death in the roads. I was also attacked. I got serious injury. We complained to the local police but we could not get any reliable protection from them.*

- *The police always asked money for us to get any protection. Only the rich people could afford to get some sort of protection. Myself and my family members left our village after riots of Godhara for some time and the situation became calm we returned back to home. But in the last year, situation became again critical when Hindu-Muslim riots occurred just [number of] kilometres from my village. We became scared. We could not sleep in the night.*

- *Then we decided to leave the country for the safety of our life. Like me, hundreds of Hindu people left the country for the safety of their life.*

- *I heard on the news and TV about Australia, which is a peaceful country. We applied for a visa..... I do not understand English. Some of the Gujurati students who live around our place helped me to make this statement.*

- *I have no documents in support of my claims except my oral evidence and this statement. When I was coming to Australia, I had no knowledge to bring any necessary documents to support my claim for the protection visa. The Migration Agent lodged application without any statement on the Application form. This statement should be accepted as my written statement for my claims.*

- *I genuine fear from the Muslims of that area. If we are compelled to go back to our country we may face persecution. The local Muslim leaders are after me and they can kill me any time. These people once decide to kill, they will kill. I appeal to the Australian Government to give us protection. We are [manual workers] and can help the [other manual workers] of Australia. I am applying for the protection visa only on the ground that we are not protected in Gujarat by the local authorities. We are unsafe there and because of that I ask for the Australian Authorities to grant protection visa.”*

I asked the applicant if he was satisfied with the interpreter provided by the Tribunal and he replied that he had no difficulty understanding the interpreter.

I asked the applicant when he prepared the two page document which contained his claims for protection. He stated that he prepared it prior to lodging his protection visa application. He stated that he prepared it in Year 2 after receiving advice from a student that he could get protection in Australia. I asked how he prepared the document. He stated that he wrote out his claims in Gujarati and then his friend translated it into English and typed the statement in English. I asked if he still had a copy of his Gujarati statement. He stated that he just told the student his story as he typed. He stated that he had an accident where he was injured and sometimes he does not remember things. I asked what he did with the Gujarati statement. He stated that he could not remember. He stated that because he had had an accident he tended to

forget things. I asked if he knew where the Gujarati version was. He stated he thought it might be in India. I asked if he wrote it in India. He then stated that he wrote it down in Australia. He then stated that he did not know whether he wrote it in Australia or India. He stated that his mental condition is not good and he cannot remember things sometimes. I asked who translated the document and typed it into English. He stated that he met him in Australia. The person is a student and told the applicant that the document would only be accepted by the Department if typed in English. I asked when the document was prepared. He stated when it was prepared in Year 2. He gave the document to his adviser but the adviser did not forward it to the Department.

I asked the applicant if his wife was relying on the claims contained within the document and he replied "yes". I asked the applicant if he was a businessman. He stated that he had a small business in City B. He opened the business a few years ago. he business stopped operating after he had his accident in Year 3 and injured himself. He went to a small dispensary where he received stitches. He stated that the accident has affected his mental ability and he also experiences breathing problems.

I asked the applicant if he is working in Australia. He stated the work he does. His wife is also working.

I asked what he feared about returning to India. He stated that Family Member M was a BJP politician and because of that he was involved in publicising the Party. The Muslim people suspected that, because Family Member M was involved the applicant would also be involved. The applicant's children currently reside in India and are attending school. They are in their teens. They live with the applicant's family. The applicant's Family Member N also resides with the applicant's family. He is married and has children. The applicant wife's family members live in the next village.

The applicant stated that he also took an interest in the BJP when he had conversations with Family Member M. The applicant stated that Family Member M was not a well-known leader. The Muslims thought that the applicant would become involved in the BJP because of his position in the family. I asked the applicant if he was a member of the BJP and he replied that he was not a member. He stated that the Muslims felt that he could participate in political activities.

I asked when the Muslims approached him. He stated that they warned him at his house that he should not be involved with any BJP activities. They were a few persons but he did not know their names. I asked when they first warned him. He stated it was after the 2002 riots and before he came to Australia recently. He stated that when elections take place they thought he might become involved in the BJP so they warned him. I asked whether it was just a verbal warning and if they had harmed him physically. He stated they had never harmed him physically but they said they would be looking for him and he was worried about his safety.

I asked what kind of activities Family Member M became involved in with the BJP. He stated that Family Member M is a manual worker and when the election comes around he helps with the publicity for the Party and that's why the Muslims think that the family is active and members of the BJP and they warn them. I asked if they had warned Family Member M. He replied "yes". I asked why Family Member M

remained in India. He stated it was because Family Member M is not financially well off. He stated that the family cannot send everyone out of the country. He then stated that Family Member M left his village and moved to the applicant's village which is a stated number of kilometres in distance. I mentioned to the applicant that it would be easy to find Family Member M. He stated that Family Member M is getting older so he is not really taking part in the BJP and does not go out of the house. I confirmed with the applicant that it was his evidence that, because of his position in the family, it was suspected that he might become involved with the BJP. He agreed that was the situation. The applicant stated that he had never been involved with the BJP. He is about [stated number of] years old. I asked the applicant if Family Member M had ever been harmed by the Muslims and he replied "never". He stated that they warned Family Member M a few times when he was doing his job, so he left his job which was manual work. Family Member M no longer involves himself in manual work and Family Member N is looking after their family interests. I asked if Family Member N had ever been threatened and he replied "no". He stated that they did not know about Family Member N because he was living in City C before he came to live in the applicant's village. He stated that it was the applicant they were interested in.

I asked the applicant what he believed would happen if he returned to India. He stated that they will definitely kill him.

I mentioned to the applicant that his evidence indicated that he was never involved in anything political. He stated it was because of Family Member M that they were warning him a few times. I mentioned to the applicant that his evidence was that Family Member M was no longer involved in political activities. He stated that they still think that the applicant might take an interest in the BJP. I asked why they would think that. He stated that they just believe that he will be involved.

I confirmed with the applicant that it was his evidence that he had been warned a few times and he agreed. He stated that also during festivals they go into the villages and look for the popular people from the villages.

The applicant stated for the period of time that he was running his business he did not have any difficulty. However, after his business closed and he returned to his village they started to warn him. This occurred approximately a few months before he came to Australia. I asked when he returned to his village. He stated he lived in his village for the last few months before coming to Australia. I asked when he closed the business. He stated he closed it down after he had his accident but he could not remember when.

I confirmed with the applicant that it was his evidence that he had never been assaulted or attacked by any of the persons who were warning him. He agreed that that was the case.

I mentioned to the applicant that in the statement he provided to the Tribunal he stated that Family Member M was a very well known leader of the BJP. The applicant stated he was not that well known but in a small village he could be regarded as well known. I mentioned to the applicant that earlier he had stated that Family Member M was not a leader. The applicant then stated that in their village a small worker could be called a leader. I asked the applicant whether he was saying that Family Member M was

leader or not a leader. He stated he was not a leader but he was well respected and known as a leader in his village.

I mentioned to the applicant that his statement indicated that he had been attacked and seriously injured and he had told the Tribunal that he was never assaulted or attacked. He then stated that he was attacked but not seriously. He stated that they just hit him. I asked if he was now telling the Tribunal that he had been attacked. He stated he was not injured and they only hit him a few times. He then stated that they want to kill him or that they warned him that they would kill him. I asked when that happened. He stated it was a few months before coming to Australia. I asked the applicant why his statement stated that he had been attacked and that he suffered a serious injury. He stated in the English language it could be serious harm. He then stated that he did not know what was written in English. I reminded the applicant that he told the Tribunal that he had written his statement in Gujarati and that his friend had translated it.

I asked the applicant if he ever complained about the matters to the police. He said that he once went to the police but they are corrupt. He stated he is poor so he had no money to give them. I asked how he afforded the trip to Australia. He stated his family got together and paid for it. I asked when he went to the police. He stated he could not remember when that occurred but thought it was about a few months before he came to Australia. I asked what he told the police. He stated that he told them that he wanted protection and they replied that they would give him protection, but he did not have any faith in them. He stated he is only a common man. I mentioned to the applicant that his statement indicated that the police asked for money in exchange for protection. I asked if they asked him for money. He stated they did but he did not give any to them because he did not have any left over from education fees and other expenses. I asked how much they requested. He stated it was not a big amount and then stated it was not a particular amount and then stated how much it was.

I asked the applicant if he had any further documents he wished to hand to the Tribunal. He replied "no". I asked if his statement was a full account of his claims and he replied "yes". I asked if he wished to add anything further and he replied "no".

FINDINGS AND REASONS

Having sighted the applicant's passport at the beginning of the Tribunal hearing, the Tribunal accepts that he is a citizen of India. The Tribunal also accepts that the applicant's wife is a citizen of India.

In assessing the claims made by an applicant the Tribunal will need to make findings of fact in relation to those claims and this will more often than not involve an assessment of the credit of the applicant. When assessing credibility, it is important to be sensitive to the difficulties often faced by asylum seekers. The benefit of the doubt should be given to asylum seekers who are generally credible but unable to substantiate all of their claims. However, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an Applicant has not been made out. See *Randhawa v MILGEA (1994) 52 FCR 437 at 451, per Beaumont J; Selvadurai v MIEA & Anor*

[1994] FCA unrep6786; (1994) 34 ALD 347 at 348 per Heerey J and Kopalapillai v MIMA (1998) 86 FCR 547.

In *Abebe v The Commonwealth of Australia* [1999] HCA 14; (1999) 162 ALR 1 at 52 Gummow and Hayne JJ observed:

“..the fact that an Applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an Applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not for life.”

The Tribunal must keep in mind that if the Tribunal makes an adverse finding in relation to a material claim made by an applicant but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true. (*See MIMA v Rajalingam* [1999] FCA 719; (1999) 93 FCR 220).

The applicants are husband and wife. The applicant husband attended the Tribunal and stated his wife was relying on his claims. For convenience, the Tribunal will refer to the applicant husband as the applicant.

The applicant claims to fear persecution because his family was believed to be involved with the BJP and this attracted adverse attention from local Muslims. He also claims that his family could not afford to pay for police protection.

In dealing with this application, the Tribunal has formed a firm view the applicant lacks credibility and his material claims cannot be accepted. The following inconsistencies and contradictions lead to the Tribunal to conclude that the applicant is not truthful or credible:

- In his written statement of claims (which he provided to the Tribunal on the date of the hearing), the applicant stated that Family Member M was a very well known leader of the BJP. During his evidence before the Tribunal he stated that Family Member M was not a well known leader.
- In his written statement the applicant stated that he is a member of the BJP. He also stated that he took an active part in organising meetings and, “gathering people in support of the BJP candidate [Person X].” During his evidence before the Tribunal, when asked if he was a member of the BJP, he stated that he was not.
- During his evidence before the Tribunal he stated that Family Member M had also been threatened by the Muslims. When asked by the Tribunal why Family Member M had not left India he stated it was because Family Member M is not financially well off. He stated that the family could not send everyone out of the country. He then stated Family Member M left his village and moved to the applicant’s village, which involved a distance of [number of] kilometres. When it was mentioned to the applicant that it would still be easy to locate Family Member M he then stated that Family Member M is getting older and is not involved in the BJP and does not leave the house.
- In his written statement the applicant stated that the Muslim group attacked him and in the process he suffered a “serious injury”. During his

evidence before the Tribunal he stated that he was never assaulted or attacked. He then stated that he was attacked on one occasion when he was hit a few times but he did not suffer any injury. When asked by the Tribunal why he had stated in his statement that he had been attacked and had suffered serious injury, he stated that in the English language it could be serious harm. He then stated that he did not know what was written in English.

The Tribunal is not satisfied that the applicant or any members of his family were targeted by Muslims for reasons of their actual or imputed political opinion. The Tribunal is not satisfied that the applicant's Family Member M was a well-known leader of the BJP or the applicant was suspected of having a political interest in that party. The Tribunal is not satisfied that the applicant was a member of the BJP or was in any way actively involved with that party. The Tribunal is not satisfied that the applicant was the subject of any attacks or threats from any Muslim group in India. Because the Tribunal is not satisfied that the applicant or members of his family were targeted by Muslim groups in India it does not accept the applicant's evidence that the police were not willing to act on any complaints by the applicant or his family or that they demanded money in exchange for protection. The Tribunal is not satisfied that the applicant has suffered any serious harm. There is not credible evidence upon which the Tribunal could find that the applicant stands at risk of suffering serious harm in the reasonably foreseeable future if he returns to India.

Accordingly, the Tribunal is unable to find that the applicant has a well founded fear of persecution for a Convention reason.

CONCLUSIONS

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicants are persons 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. Nor can they satisfy the alternative criterion in s.36(2)(b) and therefore cannot be granted protection visas.

DECISION

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