

071572774 [2007] RRTA 264 (15 October 2007)

DECISION RECORD

RRT CASE NUMBER: 071572774

DIAC REFERENCE(S): CLF2007/75766

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Andrew Mullin

DATE DECISION SIGNED: 15 October 2007

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the Applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the Applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The Applicant, who claims to be a citizen of India, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the Applicant of the decision and his review rights by letter dated the same day.

The delegate refused the visa application on the basis that the Applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The Applicant applied to the Tribunal for review of the delegate's decision.

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 applicant has 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).

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 Departmental and Tribunal files relating to the Applicant. 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 Applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Malayalam (Indian) and English languages.

Summary of written claims

In his application for protection the Applicant claims to have been born in Kerala, India. He claims he is of the Nair ethnic group and that his religion is Hindu. He claims to have received a total of eighteen years of formal education in India, graduating with a University degree. He claims to have worked as a trade foreman subcontracting with one company and as a subcontractor to another company, Company A - Company B Joint Venture. Regarding addresses where he has lived outside Australia. He states that he lived in Country A for a few months. He claims to have been married but gives no details of any family members or close relatives living in India or elsewhere.

The Applicant's substantive claims are set out in an eight-page handwritten statement attached to his protection visa application. They may be summarised as follows:

- Following his graduation he worked in various locations in India on construction projects. With two partners he founded a firm, Company C, which was registered in Jammu and Kashmir. The firm won an important subcontract from another firm, Company A – Company B Joint Venture, for a large construction project in Jammu and Kashmir. The project was a major one, valued in the millions, and his firm had to borrow money from private sources in Jammu and Kashmir in order to begin. As Jammu and Kashmir has a Muslim majority the firm had to appoint a number of Muslims as employees and also had to make monthly extortion payments to Muslim terrorist groups. The state is notorious for its lawlessness and no business can continued without making such payments to Muslim terrorist groups.
- His firm carried out the work according to the agreement. The local terrorist groups made several demands to the partners of the firm and made completion of the work nearly impossible. He received regular telephone threats from Muslim terrorist groups. There were also problems with the geological features of the site. The situation became 'unbearable' and the work undertaken by the firm partly ceased. Things deteriorated further as the terrorist groups began to hunt for the partners. The jobless employees, who were mostly Muslims, together with their organization threatened the partners' lives. Additionally, the creditors began threatening the partners and made their lives very difficult. He 'reasonably' believes that the creditors will at any time attempt to eliminate the partners.
- An additional problem is that Company B has begun civil action against the firm in the Court, demanding INR millions in compensation and the surrender of huge quantities of building equipment. They claim the firm has misused raw materials and have threatened that the partners will be implicated in a criminal case. The real intention of Company B is to secure the presence of the partners in Jammu and Kashmir so that they can be forced to pay the money. If the Applicant goes to Jammu and Kashmir there is every chance that the 'muscle men' of Company B will harass him. The Company B group will definitely influence the police force and have him arrested and there is every possibility that he will be harassed by the police. Under India law every partner is equally liable to third parties for compensation. He is not in a position to attend court to prove his innocence because he is afraid of the wrath of the terrorist groups and other groups who have a strong presence in Jammu and Kashmir.

- Jammu and Kashmir has the worst record of lawlessness in India and there are numerous instances in which Hindus from other States employed on projects there have been murdered by shooting or beheading. Extremists carrying out these attacks have the full support of local Muslims and the police and military cannot contain them. He is facing a serious threat to his life and to return to India would be suicidal.

Attached to the statement is a poor quality photocopy of a document purporting to be a “Notice for the Appearance to Parties” from the Court in a civil case between Company B and Company C, in which the Applicant is named with three other persons. The document appears to be dated and states, inter alia, that “You are hereby summoned to appear in this Court in person or by duly authorised attorney or agent to answer all material relating to the suit. Take notice that in default of your appearance on the day above mentioned the case will be dealt with according to law.” The hearing is to take place on a particular date.

The Applicant makes no further claims in his application for review.

The Tribunal received a submission from the Applicant in which he repeats his earlier claims and expands on them by claiming that:

- His firm’s work on the project stopped when Muslim terrorists suddenly demanded a huge amount of money. The terrorist began to hunt for the partners and they were also threatened by the Muslim employees who lost their jobs. They had to leave the site and hide in various places.
- Company A – Company B Joint Venture has instituted criminal as well as civil proceedings against the firm. The Court issued a First Notice of Appearance for hearing (sic). Appearance on first and second notices is not necessary but if one does not attend a third hearing the Court will issue a warrant, and this has happened to the partners. They did not attend the hearing in order to avoid the terrorists, who knew the Court schedule.
- He never believed that he would have to leave India. His business was running very well. He has had to leave the country because of Muslim terrorists who have destroyed his business and his family life. They are looking for him everywhere. He cannot go to the police for help because of the need to avoid the court hearing. He has huge debts to his creditors. He would not be able to relocate to avoid the police warrant and the terrorist group.
- He is trying to collect evidence from India concerning his business dealings and asks for time in which to do so.

Attached to the submission are:

- A typed copy of the statement attached to his application for protection together with a copy of the Court notice attached to that statement.
- Documents purporting to be a deed of partnership and deed of amendment of partnership between the Applicant and two other persons establishing the company of Company C. The Applicant has a percentage stake in company’s profits or losses, having contributed an amount of money to its capital. The deed was subsequently amended to give the Applicant a

higher percentage share of the company's profits or losses, on the basis of a contribution of an amount of money to its capital.

The Tribunal received from the Applicant additional documents purporting to be copies of a Memorandum of Understanding between Company C and Company A – Company B Joint Venture for construction of the large project, together with later letters from Company A – Company B Joint Venture accusing Company C of non-performance, terminating the agreement and demanding return of construction materials. A peculiarity of these documents is that the name of the Applicant's company is rendered variously while some of the letters are written on the letterhead of Company B but with the same address as Company A – Company B Joint Venture

Claims at hearing

The Applicant said he was aware of everything which he had submitted to the Department and the Tribunal, that everything he had claimed was true and that he did not wish to alter or add to anything he had claimed. He said he had been helped by a friend to prepare his letter and he denied that this friend was an agent.

Asked why he had left India to come to Australia the Applicant recounted the claims set out in his application for protection and the letter to the Tribunal. He said his and his partners' main problem was that they were Hindus who were facing extremist Islamic militants in Jammu and Kashmir. They would face similar problems elsewhere in India. They were in a predicament with their clients suing them, their jobs lost and the police wanting to arrest them. His partners had been forced to leave India and seek refuge elsewhere. For similar reasons he had come to Australia.

Asked what he feared would happen to him if he returned to India the Applicant said the police had records of him and they would arrest him and take him to Jammu and Kashmir. He would face similar problems elsewhere in India. Muslim labour unions and terrorists would hunt for him and make his life terrible. Asked why the police would arrest him he said the project his company worked on, for the Indian government, was very important for Kashmir and his running away had disrupted the work. This was why they had ended up in Court. The government could not protect them against known extremists and terrorists. He made a passing reference to a fear that the police would arrest him for helping Muslim terrorists.

Asked what would happen if he were arrested and taken to Jammu and Kashmir the Applicant said the company had been supporting terrorists and extremists financially. When that was known company executives would be hunted and killed anywhere in India. Asked who would do this he identified the extremist groups Lashkar e Taiba and Harkat. I asked why, if his company had been paying such groups, they would want to kill him. He said they kept increasing their demands to the point where the company could no longer pay them and its operations ceased. I put to him that it was hard to believe such groups would still wish to harm him simply because the company could no longer pay them. He said there was enmity between his company and the terrorist groups because the company exposed them as having taken bribes. The company had been paying off the agents of the groups and when it could no longer make such payments it informed its creditors. Asked how the terrorists knew of this he said that in the beginning the creditors asked the terrorists' agents not to disturb the

company because it was only small and had little financial backing. However the agents had no sympathy for small companies and rejected this request.

Asked what harm he feared from the company's creditors the Applicant said they wanted to recover their money, whether or not the company's predicament was caused by terrorists. There was a court case against them for the misuse of materials which was the property of a government department. Asked again what he feared the creditors would do, he said they would catch him, keep him in custody and demand money.

Asked if he feared harm from any other source the Applicant said the company's client, Company A – Company B Joint Venture was bringing a legal case against it.

The Applicant said was born and raised in Kerala State. He had lived in a number of cities in India and in the last three months before his departure for Australia he was living in hiding with friends in different locations in Kerala.

Regarding his employment the Applicant said that after he graduated he began work as a tradesman on construction sites and was employed by different companies until forming his company, Company C, with a small sum of money. He gave details of the other two partners in the company, who had various qualifications in engineering. He said Company C was formed specifically to bid for the contract, which was for all aspects of construction of the large project, using equipment supplied by the head contractor, Company A – Company B Joint Venture. Work began after the conclusion of an MOU with the head contractor but it slowed down a few years later and stopped later that year. The contract was terminated a few months after that.

I put to the Applicant that it was somewhat difficult to believe that a company such as his, with a working capital of only a small amount of money and three partners who lacked any managerial experience would have been awarded a contract for a project of this magnitude. He said he and one of the other partners had relevant experience as a subcontractor in the construction of another similar project. Asked what his work experience had been he said it was as a tradesman but added that as he was a University graduate he understood other aspects of the construction.

I told the Applicant that an internet search had produced no references to any company in India named Company C. He said the company was a partnership which had been formally registered in a court in Jammu and Kashmir and this was why there were no references to it on the internet. I put to him that I could similarly find no references to Company A – Company B. He said he did not know why this was so, and that he had submitted Company A documents to the Tribunal. He suggested that the Company A – Company B Joint Venture itself was a partnership and that Company B was a much younger company compared with Company A's vast experience in this type of large project.

I noted that an internet search had revealed no references to any delays with construction of the project or to the involvement of Company C or Company A – Company B Joint Venture in it. The Applicant said there were several projects involved. It was not a big matter for the newspapers but it had been reported. He did

not know if it would be possible to obtain these reports and he had not gathered them himself.

Asked to comment on independent country information indicating that it is easy to obtain falsified documents in India the Applicant said the documents he had submitted could be authenticated by reference to a government department.

The Applicant confirmed his claim that his company, Company C, had been sued by Company A – Company B Joint Venture. He said Company A – Company B Joint Venture had asked the court to award compensation in the amount of several million Rupees and the court had appointed an arbitrator. He said both civil and criminal charges were involved, the latter relating to misuse of material assigned to Company C. Asked how civil and criminal proceedings had been combined he said misuse of the construction material supplied by the government department was a criminal offence. Asked if he had been charged by the police he said the case had gone to the Court and a ‘letter’ had been served on the Company C’s partners. He confirmed that this was the “Notice for the appearance to parties” document which was attached to his submission. I put to him that this document related only to a civil case brought against Company C. He said it began as a civil matter but became a criminal matter. I put to him that the document quite clearly indicated that it was a civil matter and asked again how it was possible for a criminal case to be combined with a civil case. He said that when it turned against the company, through arbitration, the next step was criminal proceedings.

I noted that the Court document submitted by him contained some peculiarities of spelling and layout (‘CNotice for Appearance To Parties’, uneven spacing of words) and lacked any official stamps or seals. I put to him that this seemed inconsistent with the type of document which might be produced by a senior court. He said this was an important matter and that if he was given time he would produce the original. Asked where this was he said he had it in his residence in Sydney. I put to him that the peculiarities which were evident in the copy would presumably also exist in the original. He said the main difference was that the original was on paper of a different colour.

Asked if he had been served with a summons in criminal proceedings the Applicant said newspapers had reported the appointment of an arbitrator. The fact that the press had picked it up indicated the importance of the matter. I asked again if he or anyone else in the company had been charged with a criminal offence. He said it would go against them when it was found that the construction material had gone. Asked again if he had been charged he said he had. Asked when this happened he said he and the other partners did not appear in Court as demanded. He had heard from a source that the company (presumably Company A – Company B Joint Venture) was working against them. Asked again when he had been charged he said he did not know the date. Asked how he knew he had been charged he said he and the other partners enquired through staff members of ‘that company’ who told them of it. Asked if he had any substantiation for this he replied in the negative. Asked if he had engaged a lawyer for the civil case he said he had not done so. I asked him why this was so and he said it was difficult for them to go to Jammu and Kashmir as this would have put their life at risk. I asked why he could not have engaged a lawyer over the telephone. He said he was in hiding and would not have been able to give a lawyer the necessary

authority to take on the case. Asked why he could not have provided written authority he said lawyers would not take such authority from someone in hiding. I put to him that I found it hard to believe that he could not send instructions and the necessary supporting documents to a lawyer. He said a lawyer would demand a large amount of money and he could not pay it.

I asked the Applicant why, even assuming he was required to return for a court case, he would be unable to obtain protection from the Indian authorities. He said his company was very small compared with Company A – Company B Joint Venture. He and the other partners were also from another state and this made protection very difficult. If they were trapped by terrorist groups they would not even reach the court. Asked what had happened in the civil case against the company he said he did not know anything about it as it had happened after he left India.

Regarding the Applicant's claim that the police wished to arrest him I asked whether this was because they suspected him of giving assistance to Muslim extremists, as he had suggested at the beginning of the hearing. He said the police knew that everyone gave money to the terrorists and this was not a problem for him. I asked what charges he believed the police would arrest him on. He said this was a matter for Company A – Company B Joint Venture who considered that Company C had misused their machinery and materials supplied by the government department. They could report any of these matters to the police. I asked him again what role the police had in civil proceedings between one company and another. He said his company had caused losses for Company A – Company B Joint Venture which was a very big company able to harass smaller companies through the police. I put to him that it was difficult to believe that a civil case in a common law legal system such as India's could result in him being imprisoned. He responded by giving an example of the arrest and killing of a person in Kerala on the pretext of being a suspicious character. He said this was very common in Kerala and elsewhere.

I suggested to the Applicant that his claimed fear was of Muslim terrorists and trade unionists in Jammu and Kashmir but that he lived in his home State of Kerala, about as far as it was possible to go in India from there. I put to him that it was difficult to believe any Muslim terrorists or trade unionists would have an interest in pursuing him in Kerala, several years after he had last been in Jammu and Kashmir, or that they would have the ability to do so. He said Muslim terrorists operated in Bangalore, Hyderabad, Mumbai and other locations. They had better and quicker communications than the government

The Applicant said he had visited Country B for a couple of days. Asked the purpose of this visit he said he had thought of seeking refuge there but had not been successful. Asked why he had selected Country B he said this was on the advice of his travel agent. I asked him if he had sought protection and he said he had a fifteen-day visa. He knew of a contact through his travel agent and made enquiries of him. However, the contact told him that protection was not available and the system was very strict on those who overstayed their visas. Asked why he had not tried to obtain protection elsewhere he said that his agent later suggested that he could find protection in Australia. He agreed that this was some months after his Country B visit. I asked why he had not sought protection in another country, such as Bangladesh, during this period. He said people are not safe in Bangladesh. Asked why he had not

sought to return to Country A, where he had lived previously, he said it is a Muslim country and prison conditions there are very bad.

I put to the Applicant that his passport indicated that after his Australian visa was issued he had waited for a month before leaving India. He said he only heard that the visa was issued twenty four hours before he left. He said he had not worked at all following his return from Country B and his travel to Australia was financed by a relative. I noted that his visa was issued on the basis of skilled labour. He said he was not aware of the visa and he did not know if he had come to Australia to work as a skilled labourer. I suggested that the visa issuing office in India would have carried out checks with his employer and he repeated that he had not been employed at the time.

I asked the Applicant how, if the police wished to arrest him, he had been able to pass through the airport using a passport in his own name when leaving to go to Australia. He said he had been living in secret. I repeated the question and he said he had been required to attend court. He was allowed to ignore this and a second notice and it was only if he failed to respond to a third notice that he would be arrested. Noting that this was a civil case I put to him that the court document indicated he could be represented by a lawyer and the worst he could expect if he failed to appear would be that the other party would win. He said if the case went against him and his fellow partners it would appear that they had misused equipment and a criminal case could always be brought against them. They could also be accused of other serious charges.

I explained to the Applicant that on the basis of all the information he had put to the Tribunal there were a number of issues which would be important in considering his claims and which could be a reason for affirming the delegate's decision. The first such issue was that I had doubts about the truth of his claim that his company, Company C, won a major contract to build a large project, given the company's small size and the lack of managerial experience of the three partners. The Applicant said he was a University graduate and had considerable technical expertise. His bank account showed that he received an income greater than that of an ordinary worker. I explained to him that a second issue was that even if I accepted that his company had been involved in such a project and had faced extortion threats from Muslim terrorists, there seemed no reason to believe that such terrorists or anyone else would wish to harm him if he returned to Jammu and Kashmir a few years after the company had ceased to be involved. A third issue was the lack of any substantiation for his claim that a criminal prosecution had been launched against him or the other partners of Company C or that he would face arrest by the police for any reason. This meant that even if he did face harm from some source in Jammu and Kashmir there was no need for him to return there and he could continue to live in safety in his home in Kerala. A fourth issue was that there did not appear to be any reason why the Indian authorities would not protect him from Muslim terrorists or others even if he were at risk of harm in Jammu and Kashmir and did return there.

I asked the Applicant if he understood each of these issues and their relevance for the review of his case and he confirmed that he did. I advised him that he was entitled to seek more time in which to respond to the information and asked if he needed more time. He replied that he wished to respond by submitting further documents to the Tribunal and that he would need from three to six months to obtain them from India. I

considered this request but, noting that he had already been in Australia for a couple of months and it seemed reasonable to expect that his relatives or friends could obtain the documents and fax them to him, I offered him one month in which to respond. He said he would be able to do so within this period.

Further information

The Tribunal received further documents from the Applicant including:

- A covering submission reiterating the Applicant's claims and stating that he and the other partners are facing civil, criminal and arbitration proceedings in various courts and that the various summonses and other documents relating to these proceedings have been returned to sender, meaning that he is not in a position to present details of them. He is facing threats from terrorist groups, creditors, rebel groups (sic) and his wife's relatives. Company B is trying to recover millions of Rupees from the partners and he could not pay this amount during his lifetime. If he returned to India his life would be in constant danger and if he fails to obtain protection he will be forced to commit suicide.
- The Applicant's bank records, from Jammu and Kashmir.
- A photocopy of a letter said to have been written to the Applicant by a lawyer. The letter states that the case brought against the Applicant and his partners in the Court has been decided against them and the next step will be criminal proceedings. "All the offences alleged against you are non-bailable and cognizable offences. That means police could arrest you without a warrant from a court of law for the offence of criminal breach of trust. The above said offences are punishable with rigorous imprisonment. It is informed to me that, once the criminal proceedings are initiated against you, and if you are in the mother country, there is every possibility of you being arrested and put into jail for long time and remote possibility of release. Be kept in mind that the complaint is initiated by a big shark and there is every possibility of you being harassed in the custody of police." The letter goes on to state that: the Applicant will be prosecuted for misappropriation; Company B is pursuing him for the recovery of millions of Rupees in default of which he will be arrested and jailed for a long time; the police and income tax authorities are investigating him; his creditors are regularly threatening his family; his wife and relatives are intending to proceed against him and his family "for hiding the facts and cheated her for giving her consent for marriage." They also plan to initiate criminal proceedings against him for domestic violence, for which he could be imprisoned; the groups which extorted money from him are making regular threats against him and his family members. The terrorist groups are chasing him as he divulged the details to the authorities. They have gone to his house to search for him. "The terrorist groups declared jihad against you as you belong Hindu community. The terrorists are coming from Jammu and Kashmir we are not in position to defend them." The letter concludes that "it is quite unsafe for if you authorised recipient in your home country and your life would be in constant danger. There is every possibility of you being eliminated by the rival groups. Even if your jail in Australia, it is better than you being in your home country. They are also trying to track you to eliminate you."

- A photocopy of a typewritten letter, with a handwritten date, from a person who signs himself as the Applicant's 'loving brother' but who is described in an attached note as his housemate. The writer states that "as you are aware here the problems are escalating day-by-day. As you know the creditors of your firm [company name] are frequently threatening me and our family, in order to budge their illegal demand. So it quite difficult for us to restrain them from continuing their illegal acts. We are planning to shift our residence to some un-known area, in order to escape from the regular threats. But it is not possible, as your spouse is in enimical terms with me and family members. They have constituted criminal cases against you and our family members. And the case is in progress. So we can't escape from the cases at present." The writer adds that the police are enquiring as to his whereabouts and have visited the house several times late at night, making life very difficult. They are in collusion with Company B. If the Applicant returns he may be arrested and mistreated by the police.
- A copy of the newspaper highlighting a report of an Islamic terrorist bombing in Maharashtra State. On page three of the newspaper is a highlighted Notice to Company C, inserted by Company B and its partners including the Applicant, whose address is shown as being in Kerala. The Notice seeks the partners' concurrence in the nomination of a sole arbitrator for adjudication of Company B's disputes and claims. If the partners do not agree to Company B's nomination they have the right to appoint one arbitrator from their side.
- A photocopy of an agreement for the lease of a property in Jammu and Kashmir, by Company C.
- Photocopies of schedules of payments made by Company B to Company C.
- Photocopies of the correspondence and Court document sent to the Tribunal by the Applicant previously.

FINDINGS AND REASONS

On the basis of his passport which he submitted at the hearing I accept that the Applicant is a citizen of India, as he claims to be.

The Applicant claims to fear that he will be harmed, and may be killed, if he returns to India. He has identified a number of sources of such harm and, at the hearing, said that they were Muslim terrorist groups, Muslim trade unionists, the police, creditors and the company to which his own company sub-contracted to build a large project.

Construction Project

The Applicant claims that he and two partners formed a company, Company C, to bid for a subcontract for the construction project. He claims the company was awarded the subcontract by Company A – Company B Joint Venture, a much older and larger company which had been awarded contract work on the project. Work began after conclusion of an MOU with Company A – Company B Joint Venture but slowed down soon after because of technical problems and extortion demands by Muslim terrorist groups and work ceased a few months later. The subcontract with Company A – Company B Joint Venture was terminated a few years later. In support of these

claims the Applicant has submitted a number of documents said to relate to the formation of Company C, correspondence between Company C and Company A – Company B Joint Venture over the lack of progress in work on the project and a case brought by Company A - Company B Joint Venture against Company C in the Court.

I have some doubts as to the accuracy of the Applicant's claims in this area. In particular, as put to him at the hearing, it seems somewhat implausible that a project of this magnitude, involving construction of a large project at a total cost of millions of Rupees, would have been awarded exclusively to a company such as Company C with a small total working capital, three partners who lacked significant managerial experience and no previous record in this field having been formed specifically to bid for the subcontract. However, taking into account the documentary material submitted by him I am prepared to give him the benefit of the doubt by accepting that he and two other friends formed a company named Company C and that their company was involved in construction of a large project. I also accept that his company's subcontract was subsequently cancelled due to non-performance.

Court case

Although, as put to the Applicant at the hearing, there are some peculiarities about the "Notice for the appearance to parties" said to have been issued to him by the Court, I am prepared to accept that it is authentic. The document quite clearly relates to a civil matter, brought by Company B against the Applicant and his fellow partners of Company C. There is no suggestion in it that the Applicant is required to attend the Court and it states specifically that parties may be represented by their lawyers.

The Applicant claims that this is the first such Court notice and that two more would have followed if he failed to appear. He claims that, having failed to appear a third time, an arrest warrant would be issued for him. He produced no substantiating evidence for this and his responses when asked if a warrant had, in fact, been issued were notably evasive and confused. I am not satisfied it is plausible that, in a civil matter such as this, the Applicant has been required to attend court in person or that he risked anything more than losing the case by not doing so. I am not satisfied that an arrest warrant has been issued against him because of any failure to attend Court, or that he would face arrest for such a reason in future.

The Applicant's alternative basis for his claimed fear of arrest is that the case against him is a criminal one. There is nothing in the material presented by him which gives any support for this assertion. When asked why he believed he would be charged with a criminal offence his responses were, once more, evasive and confused. He suggested that he and his fellow partners would be charged with misuse of construction material belonging to a government department. Later in the hearing he added the suggestion that they would also be charged with misusing government equipment and that they could also be accused of other serious charges. Asked a number of times if he had been charged with such offences he eventually claimed he had been and that he had heard of it secondhand. Despite this, and the civil case against him, he said he had not engaged a lawyer and gave a confused account of his reasons for not having done so. He maintained for some time that the Court proceedings combined both civil and criminal elements but later modified this by claiming that the civil case had gone to

arbitration, the arbitrator would find against him and criminal proceedings would surely follow.

I accept, on the basis of the copy of the newspaper submitted by the Applicant, that the civil case brought against his company by Company B proceeded by way of arbitration. The outcome of this process is, however, entirely unclear. The only other documentary material before the Tribunal indicating the outcome of this court case against him is the letter said to have been written to him by a lawyer. This letter makes no mention of arbitration and, having considered it, I am not satisfied that any evidentiary weight can be placed on it. Its tone is notably expository and suggests strongly that it has been written to support the Applicant's protection claims. While this in itself does not demonstrate that the claims it makes are untrue, I am not satisfied it is plausible that a lawyer engaged by the Applicant would be in a position to advise him not only about his legal affairs but about such things as the threats to him from terrorist groups who have visited his house and who have declared jihad on him as a Hindu, ongoing investigations by the police and taxation authority and threats to his family from his creditors. I also find it implausible that a letter to the Applicant from his lawyer would simply recount the penalties he is said to face (very lengthy jail sentences, harassment by the police) without any discussion of other possible outcomes or possible legal defences. Finally, the fact that the Applicant has now produced such a letter, shortly after stating in his oral evidence that he had not engaged the services of a lawyer, raises doubts about the credibility of the advice given.

In this context I have also considered the letter said to have been written to the Applicant by his housemate, or brother. This letter makes reference to a separate criminal case having been launched against the Applicant and to harassment of his family by creditors and the police in collusion with Company B. I am not satisfied that any evidentiary weight can be placed on this document. Like the letter said to have been written by the Applicant's lawyer it is clearly expository in tone and states things which, if true, must have been so familiar to the Applicant as not to require mentioning. The relationship of the Applicant to the writer is unclear and I note that he has not listed any brother in Part B of his application for protection. At the Tribunal hearing, which was held after the date on which the letter was said to have been written, the Applicant made no reference to the presumably significant issue of a criminal case having been brought against him by the other party.

On the basis of the information before the Tribunal I am not satisfied that the Applicant has been charged with any criminal offence in the Court relating to his involvement with Company C or that he will face criminal charges there or anywhere else in India for this reason. I am not satisfied that he is suspected of having misused equipment or other construction materials. I am not satisfied that he will be arrested by the police for these matters or in any other way compelled to travel to Jammu and Kashmir to face alleged criminal proceedings there. I am not satisfied that he is being investigated by police or taxation authorities in relation to tax matters. I am not satisfied that another party has made complaints to the police or that there is any criminal investigation of the Applicant over such matters. Nor am I satisfied that police have been visiting his house to find his whereabouts or that they have otherwise been harassing his family members

Harm from Muslim terrorists

The Applicant claims that his company was subjected to extortion demands from Muslim terrorist organizations in Jammu and Kashmir. He claims that these demands escalated to the point where the company could no longer pay them and was unable to continue work on the large project. He claims that this has caused the terrorists to target him and the other company partners and that they will kill him.

Although the Applicant has provided no substantiation for these claims I accept that his company may well have been faced with extortion demands from terrorist organizations. As put to him at the hearing, however, if such demands did escalate to the point where the company was unable to pay them and was, in effect, driven out of business by them, it seems at least unlikely that such groups would be motivated to continue to target its partners. It seems even less likely that they would have any reason to target him now, some years after he was last in Jammu and Kashmir. I have considered his claim that Muslim terrorist groups are active and well-organized in many areas of India but I am not satisfied it is at all plausible that they would have the desire or the means to target him if he were to return to live in his home state of Kerala, far from Jammu and Kashmir. I reject his claims in this regard.

At the hearing the Applicant advanced an alternative reason for his claimed fear of Muslim terrorist groups, claiming that the company had exposed their corruption by revealing that it was paying them bribes. His evidence on this point was confused but he appeared to be claiming that the groups had agents who collected the money when the company cashed cheques, and that in some way the company or its partners revealed this fact. Having considered this claim I am not satisfied that, even if Muslim terrorist extortion had been exposed by the Applicant's company this can have been a matter of any particular concern for them. By the Applicant's own evidence, the practice of paying extortion to Muslim terrorists in Jammu and Kashmir was so common that the police were not concerned by it. If this is so it is quite implausible that any action by the Applicant's company to report or publicise the extortion would cause its partners to be targeted.

Harm from Muslim trade unionists

At the hearing the Applicant claimed that if he returned to India he would be at risk of harm from Muslim trade unionists who lost their jobs when his company ceased work on the project. I accept that many of most of the workers employed by the Applicant's company on this project may have been Muslims and that some of them may also have been members of trade unions. I also accept that those who lost their jobs may have been disgruntled and might have placed some blame on the company. However, I am not satisfied it is at all plausible that Muslim trade unionists would have sought to kill the partners of the company for such a reason, or, even less plausibly, that they would have the motive or means to do so several years later if he returned to live in his home State of Kerala.

Harm from creditors

The Applicant claims that his company borrowed money from financiers and, following the collapse of the project that it owes them large sums. He claims to fear

that the creditors will harm him, suggesting variously that they have threatened the partners, tried to eliminate them and may capture them in order to recover their money. His claims on this point were notably vague and devoid of circumstantial detail, however, and he did not make clear in what way he had been threatened, whether any attempts had been made to harm him or, if so, whether he had ever sought protection from the authorities.

I accept that the Applicant's company may well have borrowed sums which it has been unable to repay. I also accept that its creditors may attempt to recover their money from the Applicant and his fellow partners. However, there is no substantiation for his claim that he is at risk of physical harm from them for this reason. Taking into consideration the nature of the Applicant's evidence in this area, I am not satisfied there is any reason to believe they will harm him or go outside the normal lawful channels for debt recovery. While the Applicant may well be reluctant to return to India where he could be subjected to debt recovery measures, there is nothing to suggest that this has any nexus with a Convention ground and or that it could be considered as Convention-based harm.

Harm from Company A – Company B Joint Venture

Although the Applicant does not specifically claim to be at risk of harm from Company A – Company B Joint Venture, to which his company was a subcontractor on the project, he referred a number of times to that consortium (or its constituent companies) manipulating the legal system and the police to the disadvantage of himself and the other partners. Having considered his evidence I accept that he and the other partners may well be pursued through the Indian legal system by Company A – Company B Joint Venture, on the basis of a commercial dispute. However I am not satisfied that there is any basis for believing that the Applicant would be at risk of Convention-based harm from Company A – Company B Joint Venture should he return to India.

Religion-based harm

The Applicant claims that the main reason he and his partners faced harm in Jammu and Kashmir was that they were Hindus and were opposed by Muslim extremists. He claims that Hindus are targeted in Jammu and Kashmir and that many are murdered.

Whatever the truth of the Applicant's claim on this issue, the simple point is that he does not need to live in Jammu and Kashmir or, as noted above, return there for any reason. There is nothing in the evidence before the Tribunal which would suggest that he cannot return to live in his home State of Kerala and never again venture near Jammu and Kashmir. Nor am I satisfied that, living in Kerala, he would be at risk of harm from Muslim extremists whether or not they were based in Jammu and Kashmir.

Summary

The Applicant was born and educated in Kerala and has spent much of his life there. His family and home are there. He speaks Malayalam, the language commonly spoken in Kerala. I am not satisfied that, in his particular circumstances, he could not return there to live or that it would be at all difficult for him to do so.

Having considered all the Applicant's claims, individually and cumulatively, I am not satisfied that he faces criminal proceedings in Jammu and Kashmir or anywhere else in India and I am not satisfied that he would be arrested by the police for any reason and made to go to Jammu and Kashmir, or that he is otherwise at any risk of harm from the Indian authorities. I am not satisfied that he is the subject of criminal proceedings over domestic violence or tax avoidance. I am not satisfied that, living in Kerala, there is a real chance he would suffer serious harm at the hands of Muslim terrorist groups, Muslim trade unionists, the creditors of his own company or the Company A – Company B consortium or anyone else. Nor am I satisfied that he would be at risk of serious harm because he is a Hindu. I am not satisfied that he lived in hiding in Kerala before coming to Australia, as he claims to have done. I am not satisfied that he has a well-founded fear of persecution for a Convention reason should he return to India, now or in the reasonably foreseeable future, and I am not satisfied that he is a refugee.

CONCLUSIONS

Having considered the evidence as a whole, the Tribunal is not satisfied that the Applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the Applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

The Tribunal affirms the decision not to grant the Applicant a Protection (Class XA) visa.