

1001826 [2010] RRTA 397 (17 May 2010)

DECISION RECORD

RRT CASE NUMBER: 1001826

DIAC REFERENCE: CLF2009/154152

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Lilly Mojsin

DATE: 17 May 2010

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

1. 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).
2. The applicant, who claims to be a citizen of India, arrived in Australia [in] October 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] November 2009.
3. The delegate decided to refuse to grant the visa [in] February 2010 and notified the applicant of the decision and her review rights by letter [on the same date].
4. 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.
5. The applicant applied to the Tribunal [in] March 2010 for review of the delegate's decision.

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. 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'

9. 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.
10. 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.

11. 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.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. 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.
14. 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.
15. 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.
16. 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.
17. 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.

18. 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

19. The Tribunal has before it the Department's file CLF2009/154152, relating to the applicant, and containing the applicant's protection visa application (PVA), a copy of her passport and a decision by the Department rejecting the applicant's claims.
20. The applicant was born [in] March 1986. The applicant entered Australia [in] October 2009 with an Indian passport number [number deleted: s.431(2)], issued [in] May 2009 and valid to [a date in] May 2019, as the holder of a Visitor (TR-676) visa granted [in] September 2009, valid until [a date in] January 2010.
21. The applicant states in her PVA:

I hail from a very poor family. I have one younger brother. I belong to a backward community in India. We are socially and economically most backward in India and are looked down as untouchables by the upper castes. Since I belong to backward community, I myself and my family suffered a lot from the people of the upper caste of the locality. My family is included in the below poverty line and we have no house of our own. My father is a labourer. He didn't have the money to educate me as I wished but he educated me well.

I had done my schoolings at Trivandrum. I was very good in my studies as well as extracurricular activities. I had completed year 12 with good marks. On July 2006 I got admission for the course of [subject].

While I was studying in the 3rd year of [subject], I met one [Mr A], who rented a home for his business purpose near our house. In due course of time, I fell in love with him. Girls are not allowed to choose their own partner in Indian society and love affairs are very much restricted. In addition, he belongs to an upper caste and also was very rich, whereas I am from a poor lower caste family. So there was much opposition from the relatives and parents of [Mr A]. They even tried to prevent the marriage. My family members also advised me to drop the proposal fearing the consequences.

While so myself and [Mr A] together eloped and registered our marriage on [date] June 2009. [Mr A]'s family members were very much provoked by this. My family members were manhandled by them. They attempted on my life and also threatened that if I live with [Mr A] they would kill me. However I managed to escape from them. They also brainwashed [Mr A] to forsake me and marry a rich girl from upper caste. They removed [Mr A] from their family business and stopped offering financial support to him since he was living with me. [Mr A] had to give up his luxurious life which he felt bad and considered yielding to his parents' wish. I was really shocked by his thoughts and much scared because in India a girl abandoned by her husband cannot lead a respectable life. As I married him against the wish of my family, they would not accept me and I would be left alone if he left me. Having these considerations, I persuaded [Mr A] to leave the country so that he could live with me without his parents' brainwash. Under these circumstances we together came here and started living together as husband and wife. But when he contacted his parents, they continued brainwashing him to forsake me and return to India. So my husband's attitude, behaviour and temperament towards me changed. He harassed me both mentally and physically. I was abused with obscene language and teasing. He didn't allow me to go out or to mingle with other people. He used to go outside and come late without telling me. He compelled me to divorce, but I didn't accept that. I suffered everything. I don't know what happened to him. One day he went outside and never returned after that. I came to understand that my husband left my company forever.

Now I got some news that [Mr A] is in India and he got married with another girl. Because of this incident I am very much disappointed. In this country totally I am alone and I have no acquaintance with anybody. I am not in a position to return to India as my relatives have abandoned me. I don't have money for my basic needs. I don't know how to survive in life. As there was no other alternative I remain here. One of my friends told me that Australia is a nation that respects human values, human rights and social equality.

without any discrimination in the name of religion, caste or creed. I humbly request that this honourable Department may be pleased to consider me as a refugee and allow me to reside in this country permanently.

22. The delegate of the Department interviewed the applicant [in] February 2010 with the assistance of an interpreter in Malayalam and English languages. I have listened to a recording of that interview. Below is a summary of that recording, it is not a transcript.

The applicant said that she lived in [suburb] with 2 other people. The applicant said she belongs to a scheduled cast Paravan She confirmed that she completed 15 years of schooling by obtaining a Diploma in [subject] from [education provider] in Trivandrum, in May 2007. She said that in 2008 she enrolled in another diploma course-designed for the members of the scheduled castes at the [education provider] in Trivandrum. She said she did not complete this course as she travelled to Australia. Her husband's name is [Mr A] whose date of birth is [date]. She stated that she married on [date] June 2009 at [location]. She declared that after their marriage they lived independently from their families. The applicant said that since birth she has lived at [address], Trivandrum, Kerala- where her parents continue to live. The applicant said she and her husband lived at different places after their marriage. The applicant said she does not have a copy of their marriage certificate or any other evidence about her marriage. Her husband's family did not like their relationship. Her father was attacked by her husband's father's brother. The in-laws said that they do not agree with the marriage and they threatened to kill her. She did not live with them as they did not like a poor woman to be brought into their family.

The applicant and her husband travelled on visitor visas to Melbourne, departing from [City 1]. They lived in a hotel for 4 nights. She does not know the name of the hotel. Her husband left, occasionally he would come and then he vanished. On the 3rd day he pretended that he is very busy and was making overseas calls and he left the hotel without informing her. She has not seen her husband since then. When asked for the receipts for the hotel accommodation, she said that she had money. He vanished after that.

She telephoned a friend who informed the applicant that her husband has already remarried. When asked how he could marry another woman whilst still married to her, she responded that "this is what my friend said" If I go back they will trouble me and are likely to kill me. She fears that if she returns to her home she will be killed by her husband's people. When asked why she could not live with her family, she said that it is complicated. She cannot live independently. When the delegate put to the applicant that she has been able to live in Australia independently, she said that if she goes back they will kill her. Her husband's family will kill her and not allow her to be there.

The applicant stated that whilst in India she did not experience any harm by her in-laws but her family was harassed and threatened by them. She then said she was threatened over the phone because her husband is rich and his family objected their marriage and her husband is from a higher caste.

When asked for a marriage or divorce certificate the applicant said she does not have it with her, it is with her husband. She can try and get it through her friends. She has not heard from her husband since [date] October. Her husband's family did not physically harm her, only threaten her by telephone. They harmed her family.

23. The delegate of the Department did not accept that the applicant would suffer Convention related harm in India and refused the visa. The documents in support of this decision are:

- *US Dept of State Country Reports on Human Rights, 2008 Human Rights Reports: India, 25 February 2009*

- *UK Home Office Reports, India, India, 4 January 2010*
- *CX80069: Caste system in modern India [P:1999-2000 - A:20 June, 2003]*
- *CX178623: INDIA: FACTBOX-The controversy over caste-based quotas in India [P:4 June, 2007 - A:5 June, 2007]*

24. I have had regard to the evidence contained in those documents as it is relevant to the present application.
25. Prior to the Tribunal hearing the applicant faxed a submission to the Tribunal stating that her husband [Mr A] belonged to the Nair caste whereas the applicant was a Paravan. She stated that [Mr A]'s new wife's family belongs to the Baratiya Janatha Party (BJP) political party. In this submission the applicant further claimed that she feared psychological disorders due to loneliness in her new country (Australia) and unknown people from whom she cannot expect any help. She suffered discrimination against her lower class sect of Hinduism by an upper class sect of Hindu. A dowry is the most important factor in every marriage in India. Dowry deaths cause the deaths of young women who are driven to suicide by continuous harassment and torture by their in-laws in an effort to extort an increased dowry. Sometimes they are set on fire, which is known as "bride burning" and disguised as suicide or an accident. As her family was financially very weak, she was not able to provide a dowry. [Mr A]'s family, being very rich, would certainly expect a rich bride who would bring a dowry in par with their economical status. India doesn't follow common civil law and marriage acts without real separation or consent of the first wife. They either destroyed her marriage documents or forged a divorce with the help of politicians and corrupt bureaucrats. The applicant's new wife has high influence in the BJP which is dominated by upper class Hindus and ruled India prior to the Congress party, which is the current ruling party. [Mr A] and his new wife fear the legal consequences if the applicant returns to India and they continuously threaten her family members. When the applicant left India, "only [Mr A]'s relatives were trying to attempt my life with the help of the Nair community". Now even his new "wife's relatives would also attempt on my life and their influence in BJP has made me the enemy of the party as well".
26. Also sent to the Tribunal was information about the Nair caste and a 2001 article about dowry deaths in India.
27. The applicant appeared before the Tribunal [in] April 2010 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Malayalam and English languages. When asked if she had any further documents in support of her claims, the applicant said that she did not.
28. Details of the evidence given to the Tribunal is provided below. It is not a transcript.
29. The applicant said that she was studying for a Diploma of [subject deleted: s.431(2)], at [education provider deleted: s.431(2)] - in Trivandrum a 4 year course. She started in June 2006, it was a part time course. She was required to attend the [education provider] on Saturday and Sunday for 2 hours per day. On the other days she was at College studying [subject deleted: s.431(2)] for a Bachelor [degree], in a full time course, which she had started in 2004. This course was also in Trivandrum. She paid no fees for her studies because she was in a program run for members of backward castes. She lived at home with her brother and parents.

30. The applicant said that she married [in] June 2009 whilst she was studying. She met her husband when he had come for business in Trivandrum. He is from Kerala, [City 1]. She met him casually. He was staying in the city near the institute where she studied. He worked for a [details deleted: s.431(2)] business.
31. I asked the applicant the date that she met her husband and she said that she does not remember the date she met him. I asked where she met him and after some questioning she stated that she met him near [location deleted: s.431(2)]. I asked how long after they met that she took him home and she said she did not take him home at all to meet her parents. He has not met her parents. About 8 months after she and her husband met they decided to marry. It was November 2008. I asked her how long before their marriage took place, in June 2009, that they decided to get married and she said that it was about a month prior to the marriage. When she decided to marry her parents knew she was in love. She married at [location deleted: s.431(2)], which is near her husband's house in [City 1]. She went to [City 1] to marry in a temple. Her parents did not attend the wedding, only some friends of her husband came. His parents did not come to the wedding either. They did not tell anyone as she had run away from home. Her parents told her not to marry as "they are from a big house, they oppose the marriage". They later went to the registry office in [location deleted: s.431(2)] near Trivandrum and registered their marriage as they were planning to stay in Trivandrum. She never met her husband's parents. But her father and mother saw her husband's parents after she left home.
32. After the wedding she and her husband went to Trivandrum where they registered their marriage and then went to her husband's friend's house. I asked her when she contacted her parents and she said they lived for 2 weeks with her husband's friend and then they went to [City 2]. During that time her husband's parents came to her parents' house, they hurt her mother who had a heart attack. I asked how they knew where to find her parents and she said that they knew her husband was in Trivandrum and "all those things they know".
33. I asked the applicant why they married in [City 1] and she said that her husband made the decision where they were to marry. His family attacked her parents about 3 or 4 days after the marriage and as a consequence her mother had a heart attack. Her husband's parents told her husband if he does not leave her they will kill her. The husband's parents also called her on her mobile phone twice. The first time was 4 or 5 days after the marriage. The second time was a week later. She and her husband then went to [City 2] after 2 weeks, about mid July where they remained for 1.5 months. Her husband kept getting calls from his parents. She and her husband left [City 2] in September 2009 and went to Bombay. They were in Bombay for a month, they then went to [district deleted: s.431(1)] for a few weeks, then to [City 1] to come to Australia.
34. They moved around India because her husband's parents were trying to kill her. They received information when they were in Mumbai that they were trying to kill them. When asked if they went to the police she said there was no time.
35. They decided to come to Australia, as her husband knew something would happen. They decided to come to Australia in April 2009 before they got married because her husband knew that after they married there would be problems. They did not think to go anywhere else in India because they cannot stay in another place as everyone knows about them in every state. Two of her friends had told her about obtaining a protection visa in Australia so she came to Australia to seek this visa.

36. The applicant said that she stayed in Melbourne for 4 or 5 days. In Melbourne she stayed in a hotel and her husband contacted his mother who asked questions at that time. Then she did not know what happened and her husband started to hit her and he just left. He never came back. They were in a hotel, she does not know the name of the hotel. When I asked her about paying the bill she said that it was prepaid in advance but she had to pay extra money as she had stayed an extra 4 or 5 hours. Her husband told her he would divorce her and then he did not say anything, he just left.
37. After he left she did not know what to do so she called a friend in Trivandrum who gave her the telephone number of friends in Sydney She called those people and made arrangements with them to go to Sydney and to meet with them at [location deleted: s.431(2)]. She said that she took a taxi from Sydney Airport.
38. I asked the applicant about travelling to Sydney. She claimed that she travelled to Sydney by aeroplane but she could not remember which airline she had travelled with. I asked her how she was able to organise the ticket to fly to Sydney and she said she did not know what to do and caught a taxi to the airport. She then stated that the ticket was organised by her husband who had organised it before. I asked how her husband knew she was going to Sydney on that particular day and she said it was their plan. I asked the applicant to explain how her husband, who had walked out on her earlier that day, had organised her airline ticket to Sydney. She said that she had some money as her husband had left her some money before.
39. Her husband is in India now. She called her friends and they told her. They also told her that he married somebody else. She does not know how he married again but the new bride comes from rich people who have a good hold politically.
40. I asked why she cannot return to India and she said that her husband's family will kill her as she will take action against her husband. Even the new bride's parents want to kill her. This is because he has committed bigamy.
41. I asked why the Indian police will not protect her if these people want to kill her and she said that they have political connections and money and power and she is from the backward class. I put to the applicant that the independent evidence does not suggest the police would not protect her even were the new wife to have political connections with the BJP or because her own family are poor. She did not agree. I put to her that she was only threatened twice on the telephone by her husband's parents and she said that they did not get a chance to see her.
42. I asked her for her husband's date of birth and she said that it was [date deleted: s.431(2)]. I put to her that Department Movement Records do not show that a person with her husband's name and a birth date of [date deleted: s.431(2)] came on the same flight with her to Australia She said that he told her that was his date of birth. I put to her that she had not produced a marriage certificate to the Department or the Tribunal and she responded that if the Tribunal were to give her time she would be able to get it. I said to the applicant that she had been put on notice by the Department that she had not produced a marriage certificate and she was aware that her marriage was in issue, I explained that she had had sufficient time to obtain any documents from India as she had attended a Department interview in February 2010.
43. I asked her who wrote the lengthy submission provided to the Tribunal and she said it was [Person B]. When I asked for further details about this person she merely said that she met him. I asked why she would be killed by her husband's parents for her dowry as she was no longer married to her husband and she said he has married a rich woman. I asked why anyone

would want to harm her for a dowry if she was no longer married. She said that it was because she could not give a dowry that she would be killed.

44. At the end of the hearing I outlined the difficulties I had with her claims and asked her if she wished to comment.
45. I told her that I found it difficult to accept her claim of marriage because she had not been able to provide a copy of her marriage certificate. I also explained that I could not accept that her husband had divorced and re-married in such a short time. She responded that they are connected with politics and it can happen.
46. I put to her that I found it difficult to accept that anyone wanted to harm her because she was married to her husband when she also claims that she was no longer married to him, she claims that he has divorced her. She responded that if she goes back she will file a case against him. I put to her that she would be able to do that and that she would have the protection of the Indian legal system if anyone sought to harm her. She said that they will not protect her.
47. I put to her that her former-in-laws and the new wife's family appear to seek to harm her for her intention to commence proceedings against her husband for bigamy and that this was not a Convention related reason for the harm she claims she fears. She responded that they are connected to the BJP.
48. I put to her that the country information suggested that in India she would receive effective state protection and that she could access non discriminatory protection if she feared private individuals or groups in India, ie her former in laws or new wife's parents. I put to her that she had not suffered serious harm in India, she had only been verbally harassed on the telephone on 2 occasions. I put it to her that if she feared these people she could access protection from the authorities. She responded that even the rich people cannot protect themselves. They are connected with a lot of people and the police would not listen to her even if she complains.
49. I put it to her that if she feared harm she could live elsewhere in Kerala or in India where she would be safe from harm from those people she claimed may cause her harm in the future. I put it to her that she was young, healthy and educated and that there was no reason she could not move elsewhere if she feared harm. She had moved to Australia and she had especially been able to move from Melbourne to Sydney, alone. She responded that wherever she stays in India she will be harmed.
50. I put to the applicant that Department records indicate that a person with the same name as her husband, but born on [date deleted: s.431(2)] had arrived on the same plane and had departed Australia [in] October 2009. If this person was her husband, if he had divorced her then there was no reason to harm her. She cannot take any proceedings for bigamy as she is no longer married. She said that she has told the Tribunal her whole situation. When asked if there was any further information she wished to place before the Tribunal she responded "no".

BACKGROUND INDEPENDENT INFORMATION

51. According to the US State Department Report India 2007,

India is a longstanding and stable multiparty, federal, parliamentary democracy with a bicameral parliament and a population of approximately 1.1 billion. Manmohan Singh was named prime minister following his Congress Party-led coalition's victory in the 2004 general elections. The government generally respected the rights of its citizens. The law provides for freedom of assembly and association, and the government generally respected this right in practice. The authorities normally required permits and notification prior to holding parades or demonstrations, and local governments ordinarily respected the right to protest peacefully. The law provides for the right of association, and the government generally respected this right in practice. The constitution provides for freedom of speech and expression; however, freedom of the press is not explicitly mentioned. The government generally respected these rights in practice. An independent press, a somewhat effective judiciary, and a functioning democratic political system combined to ensure freedom of speech and of the press. A wide variety of domestic and international human rights groups generally operated without government restriction, investigating abuses and publishing their findings on human rights cases. The law provides for freedom of movement, and the government generally respected this in practice.

52. UK Home Office Report August 2008 states:

9.01 Jane's Sentinel Security Risk Assessment of India, Security and Foreign Forces, Police, updated 6 May 2008, observed:

"Law and order is primarily a state concern, with individual states responsible for their own poorly paid and ill-equipped police forces. There is no national police force as such, and state police are in general corrupt and inefficient. In many rural areas they are extensions of local landlords' power and in some instances cooperate in caste-oriented persecution. In urban centres they find it difficult to prosecute criminal acts by well-connected dignitaries or their relatives and associates, and are on occasion drawn into co-operation with criminal gangs. Petty corruption is rife, and few citizens have any respect for the police.

"Each state has its own armed police force (national total some 400,000) which is meant primarily for duty in its own state but can be moved elsewhere in response to emergencies. In addition, the Central Reserve Police Force (CRPF) [total of 180,000] is tasked with internal security duties and is deployable throughout the country"

9.02 The USSD Country Report 2007 stated that:

"Although the governments of 28 states and seven union territories have primary responsibility for maintaining law and order, the central government provides guidance and support. The Ministry for Home Affairs controls most paramilitary forces, the internal intelligence bureaus, and the nationwide police service, and provides training for senior police officers of the state-organized police forces.

"Corruption in the police force was pervasive and acknowledged by many government officials. Officers at all levels acted with considerable impunity and were rarely held accountable for illegal actions. Should authorities find an officer guilty of a crime, transfer to a different post or position was the common response. Human rights activists and NGOs reported that bribery was often necessary to receive police services."

.....

9.30 The National Human Rights Commission (NHRC) was set up by the Government of India under the Protection of Human Rights Act 1993, amended 2006, to provide for the constitution of a National Human Rights Commission: "State Human Rights Commission in States and Human Rights Courts for better protection of Human Rights and for matters connected therewith or incidental thereto." The National Human Rights Commission can inquire suo motu (on its own initiative) or on a petition presented to it by a victim or any person on his behalf, into complaints of human rights violations or abetment or negligence in the prevention of such violation. The Commission has the powers of a civil court trying a suit under the Code of Civil Procedure in the course of inquiry. When dealing with complaints of violation of human rights by members of the armed forces, the Commission may seek a report from the central Government and on receipt of this report it may decide to proceed with the case and make its recommendations to the Government. The central Government must report on the action taken within three months or further time as the Commission suggests. The Commission must publish its report along with the recommendation and actions taken and a copy shall be provided to the petitioner or representative. State Human Rights Commissions exist. (National Human Rights Commission, accessed 1 June 2008)

9.31 The USSD Country Report 2007 stated that:

"The main domestic human rights organization was the government-appointed NHRC [National Human Rights Commission], which acted independently and often voiced strong criticism of government institutions

and actions. Some human rights groups claimed the NHRC was nevertheless hampered by institutional and legal weaknesses... The NHRC did not have the statutory power to investigate allegations and could only request that a state government submit a report, which state governments often ignored. Human rights groups such as ACHR [Asian Centre for Human Rights] claimed that the NHRC did not register all complaints, dismissed cases on frivolous grounds, did not adequately protect complainants, and did not investigate cases thoroughly.

“The NHRC could investigate cases against the military and recommend-but not mandate-compensation to victims of abuse... Many states had their own human rights commissions, and human rights groups alleged that state human rights commissions were more likely than the NHRC to be influenced by local politics and less likely to offer fair judgements.” [2c] (Section 4)

9.32 The same report continued: “As of October, only 17 of the 28 states had state human rights commissions, as recommended by the 1993 Protection of Human Rights Act (PHRA). The Jammu and Kashmir state legislature established its state human rights commission in 1997. The commission does not have the authority to investigate alleged human rights violations committed by members of the security forces.” [2c] (Section 4) The NHRC website, accessed 28 September 2007, listed State Human Rights Commissions existing in: Andhra Pradesh, Assam, Himachal Pradesh, Jammu and Kashmir, Kerala, Madhya Pradesh, Maharashtra, Manipur, Orissa, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh, West Bengal, Chhattisgarh, Karnatka and Gujarat. [47c]

12.10 The USSD Country Report 2006 stated that “In 2003 the Delhi High Court issued new witness protection guidelines to reduce the number of witnesses who recanted their testimony under threat from defendants.” [2e] (Section 1e)

12.11 Witnesses appearing in court on criminal cases cannot be provided with police protection. The Supreme Court of India stated that it was not “physically possible” for police to grant protection to the thousands coming to court on a daily basis. However, if the court is convinced that the witness needs protection, provision should be given to the public prosecutor and trial judge to order it. (Rediff.com, 22 January 2007) [71b]

53. The term “scheduled caste” refers to low caste Hindu groups that are accorded special status by the Indian Constitution. The identified castes suffered, and continue to suffer, severe forms of discrimination within the traditional Hindu social order. In the context of that order, they were unable to participate in the community life of Indian society. The castes notified as “scheduled” comprise 16% of India’s total population and are granted benefits under a system commonly referred to as “protective discrimination”. The benefits include: reserved electoral offices, reserved jobs in central and state governments, and special educational benefits. The scheduled castes are alternatively known as *dalits*. Previous appellations used to describe them include: untouchable and *harijan*. An overwhelming body of information indicates that members of the *dalit* community continue to experience severe forms of discrimination and violence throughout India. The US Department of State’s latest report on human rights practices in India states:

The 1955 Civil Rights Act made the practice of untouchability, which discriminates against dalits and others defined as scheduled castes, a punishable offense; however, such discrimination remained ubiquitous, stratifying almost every segment of society. Many members of lower castes were relegated to the most menial of jobs and had little social mobility. The widespread belief that dalits and low caste Hindus, Muslims, Christians, and Sikhs were inferior compounded the discrimination they faced. Despite stated efforts by the government to eliminate the discriminatory aspects of caste, the practice remained, and widespread discrimination based on the caste system occurred throughout the country. Human rights groups asserted that the government was not committed to ending caste-based discrimination, pointing at the government's failure to fill over 50 thousand vacant positions specifically reserved for dalits...

Discrimination against dalits covered the entire spectrum of social, economic, and political activities, from withholding of rights to killings and was not solely practiced by high-caste

Hindus against the lower castes and dalits. The stratification within the dalit community also resulted in discrimination by higher-level dalits against lower-level dalits. There was also discrimination within the Christian community by older, established ancestral Christians against more recent dalit Christian converts (US Department of State 2006, *India: Country Reports on Human Rights Practices – 2005*, 8 March).

54. The Paravan caste is one of 68 scheduled castes in the Kerala State.
(<http://www.kerala.gov.in/kpsc/sc.pdf>)

55. It is easy to obtain fraudulent documents in India (Canadian IRB report IND102461.E
<http://www.unhcr.org/refworld/type,QUERYRESPONSE,,IND,469cd69714,0.html>)

An official from the Canadian High Commission in New Delhi provided the following information to the Research Directorate regarding the availability of fraudulent identity documents in India in correspondence dated 17 April 2007:

To my knowledge there are no identity documents in India that are not altered or counterfeited frequently. Even when we send them for verification we cannot be sure that the "verifier" has not been paid to tell us the document is genuine.

Several media sources report the availability of fraudulent identity documents in India (*Hindustan Times* 24 Feb. 2007; *The Hindu* 22 Jan. 2005; *The Times of India* 5 Feb. 2006).

56. According to Gender and Religion in Kerala by Josh Andrix, writing for Haverford College
http://www.haverford.edu/engl/eng1277b/Contexts/gender_and_religion_in_ker.htm

Keralites are divided into social groups and subgroups known as castes. Castes are divisions based on religion and labor and are inherited through birth and marriage. They serve social divisions that are often used to pick marriage partners and form social groups. Caste is probably more often than not something known but not spoken. Lower castes are often in the lowest paying jobs. Despite many reform efforts to abolish the untouchable castes and strip a kind of caste authority, the position in a high caste still holds some degree of power. Under the caste system a person in Kerala is linked to a group (a caste) that denotes a religion and a family labor history. While the caste system functions on some levels as codes of interaction in the world, there are many exceptions to every rule in contemporary Kerala.

57. According to UK Home Office Report <http://rds.homeoffice.gov.uk/rds/pdfs10/india-040110.doc>

24.26 The Freedom House report, *Freedom in the World 2008*, India, noted that “Despite the fact that making demands for dowry is illegal and hundreds of people are convicted each year for the crime, the practice continues.” [43a] On the same subject the USSD 2008 recorded:

“The law forbids the provision or acceptance of a dowry, but dowries continued to be offered and accepted, and dowry disputes remained a serious problem ... In May 2005 the Supreme Court ordered the creation of a commission to end dowry. In August 2005 parliament passed the Domestic Violence Bill to deal with dowry-related harassment and murder. The bill provides sweeping powers to magistrates to issue protection orders ... From January 1 through September 30 [2008], Andhra Pradesh police reported 392 dowry deaths: Tamil Nadu police recorded 178; and the Karnataka State Commission for Women recorded 98. According to the NCRB, 8,093 dowry cases were registered in 2007.” [2e] (Section 5)

24.29 As recorded in the USSD Country Report 2007 “Madhya Pradesh, Kerala, Bihar, and several other states had a chief dowry prevention officer (CDPO), although it was unclear how effective these officers were. Madhya Pradesh also required that all government servants seeking to marry produce a sworn affidavit by the bride, the groom, and his father that no dowry exchanged hands.”

24.30

24.31 The Freedom House Freedom in the World 2008, India noted that “Each year, several thousand women are burned to death, driven to suicide, or otherwise killed, and countless others are harassed, beaten, or deserted by husbands, in the context of domestic disputes that sometimes include dowry-related issues... Rape and other violence against women are serious problems, and lower-caste and tribal women are particularly vulnerable.”

.....
24.46 The Ministry of Home Affairs answer to an ‘unstarred’ question (no.3005) in the Lok Sabha for 22 March 2005 stated:

“The Government of India has issued guidelines to the State Governments to give more focused attention to improving the administration of criminal justice system and to take such measures as are necessary for prevention of crime against women. The steps taken by Delhi Police to check crime against women and children include:

- Establishment of a Crime Against Women Cell;
- Setting up of Rape Crises Intervention Centres in all the nine Police Districts;
- Association of Women Police Officers in investigation of rape cases;
- Setting up of Special Courts headed by Women judges to try rape cases;
- Networking with Non-Governmental Organisations;
- Deployment of staff in plain clothes at vulnerable places;
- Starting of dedicated telephone helplines;
- Constitution of ‘Women Mobil [sic] Team’ to attend to distress calls from women on round-the-clock basis;
- Briefing of the police personnel regularly to be more vigilant to prevent crime against children;
- Deployment of Police personnel at schools specially to keep watch on suspicious persons at the time of opening and closing time of schools;
- Advising school authorities in Delhi not to allow the children to go out of the school premises during school hours and to persuade the parents to educate the children not to mix-up/be friendly with strangers and also not to accept any gift or eatable from any unknown person; and
- Collection of intelligence to identify and keep watch on gangs and persons suspected to be involved in committing crime against children.” [28b]

24.53 India’s National Commission for Women (NCW India), accessed 10 July 2007, noted that it “...regularly extends financial support to NGOs and educational institutions to conduct Legal Awareness Programmes to enable women and girls to know their legal rights and to understand the procedure and method of access to the legal systems. So far 55 Legal Awareness Programmes have been conducted.”

FINDINGS AND REASONS

58. I find that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. I find that the applicants have made a valid application for review under s.412 of the Act.
59. The applicant claims she is a national of India and accordingly, for the purposes of the Convention, her claims have been assessed against India as her country of nationality.
60. The applicant claims that she is a Hindu from the Paravan caste and she married [Mr A] [in] June 2009 who is from the Nair caste. Because of a lack of a dowry and the Indian caste system, her husband's family have tried and will continue to try to kill her if she returned to India. Furthermore her husband returned to India from Australia and he has married a woman from his own caste. This family are rich and are connected with the BJP. They also seek to harm her. She intends to take legal action against her husband on her return to India as her husband could not have obtained a divorce without some influence or destroying some papers.
61. I accept that, as Beaumont J observed in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 at 451, 'in the proof of refugeehood, a liberal attitude on the part of the decision-maker is called for'. However this should not lead to 'an uncritical acceptance of any and all allegations made by suppliants'. As the Full Court of the Federal Court (von Doussa, Moore and Sackville JJ) observed in *Chand v Minister for Immigration and Ethnic Affairs* (unreported, 7 November 1997):

'Where there is conflicting evidence from different sources, questions of credit of witnesses may have to be resolved. The RRT is also entitled to attribute greater weight to one piece of evidence as against another, and to act on its opinion that one version of the facts is more probable than another' (citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 281-282)
62. The applicant did not suffer discrimination in her education in India. Whilst she states that she came from a poor family and did not complete tertiary studies in [subjects deleted: s.431(2)] nevertheless the applicant was able to attend two institutions of tertiary learning in India at the expense of the Indian government.
63. I accept that the applicant travelled to Australia with a person called [Mr A]. I do not accept that this person was her husband. I do not accept that the applicant is a witness of truth. I am satisfied the applicant has created her claimed in order to obtain the visa sought.
64. Firstly, the applicant's evidence in relation to her marriage to her husband was unconvincing and unsatisfactory. The applicant was unable to explain the circumstances of how she met her husband. Neither could she explain the development of the relationship in any great depth as would be expected of a person describing her courtship and her decision to marry a person from a higher caste. She was unable to explain the circumstances surrounding their first meeting and eventually said that she met her husband at [location deleted: s.431(2)] but could not recall a date.
65. The applicant does not suggest that she suffers from any medical condition which would affect her ability to recall details or events. I am of the view that had the applicant met her husband in November 2008, a man from a higher caste, and she continued to meet with him

until they eloped and married some months later against the wishes of her family, she would have been able to describe in some detail how the parties met and how the relationship developed. It does not ring true.

66. Secondly, the applicant claims that she travelled to Australia with her husband, [Mr A]. A person with the same name travelled to Australia on the same flight as the applicant but his date of birth was not the same date the applicant provided to the Tribunal. When I put this information to the applicant, she said that the date she had provided was the date [Mr A] had told her as his date of birth. I do not accept that a person, who claims to have married her husband in India and registered the marriage in a civil registry, applied for a visa to come to Australia, exited India, travelled with him on a plane to Australia where a passport is needed to be produced in order to obtain entry to Australia, would not have known the date of birth of her husband. Whilst the applicant claims that she fears developing psychological disorders due to loneliness in Australia, the applicant does not suggest that she has any psychological disorder or that she suffers from any medical condition affecting her ability to recall dates or events. It does not ring true.
67. Thirdly, the applicant has not produced a marriage certificate or any other information, such as photographs or declarations from friends, to support her claim of marrying in India. When put to her that she had not produced a marriage certificate to the Department the applicant told the Tribunal that she needed time to obtain a marriage certificate from India. The applicant was put on notice by the Department that her marriage was an issue in her protection visa application. The applicant was notified by the Tribunal, by letter [in] March 2010, that the Tribunal had considered the material before it and was unable to make a favourable decision on that information alone. She was invited to attend the Tribunal hearing and attached to that Tribunal letter was information about the Tribunal hearing informing the applicant that the Tribunal hearing was her opportunity to give evidence and present arguments to the Tribunal. In response she provided a submission to the Tribunal prior to the hearing.
68. The independent evidence, cited above, indicates that it is easy to obtain fraudulent documents in India. The applicant did not provide a marriage certificate to the Tribunal. I am of the view that her request to obtain a marriage certificate from India, at the Tribunal hearing, is an attempt to obtain additional time in the processing of her application.
69. Fourthly, the applicant initially stated at the Tribunal hearing that she and her husband arrived in Australia and went to Melbourne. In Melbourne, her husband called his family and after speaking to them left her after 4 days. She said that she was required to pay additional monies to their pre-paid hotel after her husband walked out and left her. She did not have any receipts from the hotel to support her claim. She was unable to provide the name of the hotel despite claiming that she stayed in that hotel for 4 days. Additionally, the applicant was unable to recall on which airline she travelled to Sydney. She said that after her husband left her, she called a friend in Trivandrum who organised her friends in Sydney to assist her, so she travelled to Sydney. When questioned about how she made arrangements to travel to Sydney, that same day after her husband had left, her evidence was vague and unsatisfactory. She was unable to explain how she arranged her travel by plane to Sydney later that day. After being questioned about how she was able to get a plane to Sydney from Melbourne, she then said that her husband had organised the ticket. I am of the view that the applicant has refused to disclose to the Tribunal any information about her whereabouts in Australia after her arrival in Melbourne, in order to avoid the Tribunal making independent enquiries about her claims.

70. On the evidence before me I am satisfied that the applicant is not a witness of truth who has created her claims in order to obtain the visa sought. As the applicant is not a witness of truth I find that the applicant is not from the Paravan caste. I find that the applicant did not marry [Mr A] in India, that her parents were not attacked and harmed by [Mr A]'s family and that she was not threatened or harmed by [Mr A]'s parents. As the applicant was not married to [Mr A] I do not accept that she and [Mr A] were in hiding in India, I do not accept that [Mr A] divorced her and he remarried and/or committed bigamy or that his new wife and her parents seek to harm her or that any other person or group in India seeks to harm her. I also find that the applicant does not fear harm for not providing a dowry to [Mr A] and his family, or that she will commence legal proceedings on her return to India against [Mr A]. As the applicant is not a witness of truth, I am not satisfied that [Mr A] is from the Nair caste.
71. On the evidence before me I am not satisfied that the applicant fled India fearing Convention related harm.
72. I am required to consider the situation were the applicant, a female from Kerala who has started but not completed a degree in [subjects deleted: s.431(2)], to return to India now or in the reasonably foreseeable future. I accept that 'women' are a particular social group in India.
73. According to the *US State Department Report India 2009*, India is a longstanding and stable multiparty, federal, parliamentary democracy with a bicameral parliament and a population of approximately 1.1 billion. The government generally respected the rights of its citizens. The law provides for freedom of assembly and association, and the government generally respected this right in practice. The law provides for the right of association, and the government generally respected this right in practice. The constitution provides for freedom of speech and expression; however, freedom of the press is not explicitly mentioned. The government generally respected these rights in practice. An independent press, a somewhat effective judiciary, and a functioning democratic political system combined to ensure freedom of speech and of the press. A wide variety of domestic and international human rights groups generally operated without government restriction, investigating abuses and publishing their findings on human rights cases. The law provides for freedom of movement, and the government generally respected this in practice.
74. Kerala state has a democratically elected government, run by a council of ministers, headed by a Chief Minister. I am satisfied that Kerala has effective judicial and law enforcement agencies, is governed by the rule of law and has an infrastructure of laws designed to protect its nationals against harm of the sort feared.
75. I accept that corruption exists in the Indian police forces. I accept that there is information indicating that police and law enforcement authorities are slow to counter societal attacks. But I am not satisfied that the independent sources such as Amnesty International or UK Home Office or the US State Department suggest that police investigation in India for offences against women is ineffective and that prosecution of attacks on women signal that they could commit such violence with impunity. I prefer to rely on sources such as US State Department, UK Home Office and Amnesty International.
76. I accept that the Indian court system is slow but I am not satisfied on the information before me that women suffer discrimination within the legal system or lack protection. I am satisfied that the applicant can access non discriminatory protection if she feared private individuals or groups in India. I accept that the government continues to be undermined by political infighting, pervasive criminality in politics, decrepit state institutions, and widespread

corruption. I accept that police corruption was pervasive. But the Government of India has authorized the Central Vigilance Commission to receive written complaints for disclosure on any allegation of corruption or misuse of office and recommend appropriate action. The Central Bureau of Investigation (CBI) is an independent investigating police agency for major crimes having interstate and international ramifications. One of the divisions is the anti-corruption division, responsible for collecting information on corruption and carrying out inquiries and investigations into complaints about bribery and corruption, and also taking action to prevent corruption.

77. On the evidence before me I am satisfied that there is effective and adequate state protection available to the applicant in Kerala, India. I am satisfied that such protection would not be denied or withheld to the applicant for a Convention related reason. I am satisfied that the real chance of harm, if the applicant were to return to India or to Kerala, is remote.
78. I do not accept that the applicant has a well-founded fear of being persecuted for reasons of her membership of a particular social group or any other Convention related reason if she were to return to India. I am satisfied the applicant is able to return to India.

CONCLUSION

79. 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

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

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 Officer's I.D. *AGIBSO*