

0808164 [2009] RRTA 519 (4 June 2009)

DECISION RECORD

RRT CASE NUMBER: 0808164

DIAC REFERENCE(S): CLF2008/118295

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Louise Nicholls

DATE: 4 June 2009

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 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.
3. 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.
4. The applicant applied to the Tribunal for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. 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. I have before me the Department's file, which includes the application for a protection visa and the delegate's decision record. I have also had regard to the material referred to in the delegate's decision, and other material available to me from a range of sources.

Application for Protection Visa

20. The following personal details of the applicant and the written claims are contained in the protection visa application and accompanying statement.
21. The applicant claims he is a citizen of India and was born and educated in Town 1, District A in the Indian state of Kerala. He is in his thirties, speaks Malayalam and Tamil, and is a Christian. He described his occupation and gave a history of employment as "shop keeper/fisherman".
22. The applicant married in a recent year and his wife is living in Kerala, India. Prior to his arrival in Australia (for about a year before his departure from India) he lived at an address in Kerala . Prior to this he lived in Country A for several years.
23. The applicant arrived in Australia travelling on an Indian passport and entered Australia on a temporary visa.
24. In the statement accompanying the application for a protection visa the applicant claimed that;
 - He was born in Town 1, District A in Kerala State and he and his parents were Christians. The applicant was brought up as a Christian and attended the Church and was involved in church activities during his youth.
 - After he completed studies at college he became a fully fledged Christian and joined school and college friends in working for the Church. Due to his involvement with the Church he had no time to further his studies. He had travelled with the Church fathers to areas where Dalits and Untouchables lived and helped to improve their conditions. He had been taught in Christian schools that he should help the poor, spread the message of Christ and to do service wherever possible.
 - As there are a large percentage of educated people in Kerala he found it difficult to find a suitable job so he started working in the fishing industry. His father and relatives owned fishing boats, were fishermen and the applicant's house was close to the beach. After a while he started to earn a reasonable amount of money selling fish. There were many Christian youths who were

involved in the fishing industry and Christian fishermen always travelled together and supported and helped each other whenever there was a disaster.

- There were continuous disputes in the mid-sea between groups of Muslim and Christian fishermen. The Christian fishermen were well-known in the trade as reasonable, trustworthy and efficient fishermen and most of the villagers depended on their catch. The Muslim fishermen sold fish to their own people but if people of other faiths approached them they would overcharge the Christian fishermen would sell the fish at the same price to everyone without any difference. People preferred to buy fish from Christian fishermen so business was booming.
- Disputes between Muslim and Christian fishermen became frequent and on one occasion there was a riot instigated by the Muslims against the Christians. The Muslims started attacking Christian fishing villages searching for Christian fishermen so they could kill them. After the riot was controlled by authorities nobody went fishing for a couple of weeks.
- The following month the authorities arrested the applicant along with some friends and they were brought to District A police station where they were questioned about the deaths of Muslim fishermen killed in the riots. The Church father assured authorities that the applicant had been in church at the time of the deaths.
- Muslim thugs found out they had been released and started searching for them. They made threats of violence against the applicant and his friends and police were called, however, the applicant's family persuaded him to leave Kerala for his own safety.
- The applicant moved to Tamil Nadu as he could speak Tamil however he found it very difficult to compete for a job. He could not stay in other parts of India due to language problems and his prospects of finding a job was bleak so a relative arranged an agent who arranged for him to go to Country A. He worked in a store in Country A for several years before his relatives in Kerala told him that a new government had come to power and it was safe for him to return. He could not obtain any further visas to stay in Country A so he decided to return to Kerala as his fiancée and relatives wanted him to get married and settle down.
- When he arrived in Kerala he married his girlfriend. She did not want him to go fishing anymore. As she had an interest in politics and was involved in the Church she encouraged him to do work for the church whilst she applied for jobs. His wife's parents lived the same area and were of great help. He settled in his village and spent time visiting the churches.
- In Kerala the CPI - M. government was supporting Muslims to expand into coastal areas and many Christian fishermen were assaulted by Muslims in the presence of the authorities. The situation had dramatically changed from when he had been working as a fisherman. Now the Christian fishermen were constantly harassed by Muslim landowners and authorities wanting to acquire their land. Muslim businessmen gave bribes to the authorities to purchase land

belonging to the Christian fishermen. The land occupied by the fishermen started to decrease due to threats and intimidation by Muslim thugs and authorities.

- Many Christian families were being harassed and the Church fathers and highly educated Christians were trying hard to end this harassment. The CPI - M. government gave their full support to the Muslims and refused to listen to Christian complaints. The Kerala Christian youths decided to form a group to protect Christians in general and the group decided not to sell the property to the Muslims.
 - The RSS Hindu extremists realising they were planning to protect Christians started to instigate trouble and spread news amongst the Muslims that Christians were planning to attack the Muslims. In the middle of the night Muslim and RSS thugs were seen loitering around in front of their houses and started throwing stones. A violent dispute took place and some Christian youths were severely beaten and had to be taken to hospital.
 - Police officers came to the hospital to investigate the incident and wanted all the Christians who assembled at the hospital to report to the police station with their identity cards.
 - The following day when he attended the police station he was questioned about his time in Country A and when his old records were checked he was sent to a police station in Town 2 He claimed that the police officer in control of this station was very powerful and supported the Muslim groups He claimed that this officer was in constant contact with Muslims and he allowed some Muslim thugs to harass and sexually assault the applicant whilst he was in detention. He claimed that the police officers were watching them from outside the cell and did nothing to prevent the assault.
 - The following day his wife arranged for his release through payment of a large bribe. When he was released the police officers told him that he could be arrested unless he left the country. They said if he stayed in any part of India and worked with any Christian groups or complained to the Church he would be brought back to Kerala and sentenced to prison on false charges. He was ashamed and could not complain about his mistreatment and his wife pleaded with him to leave the country.
 - *Details about the applicant's travel to Australia have been deleted in accordance with section 43 of the Migration Act as they may serve to identify the applicant.* He does not wish to live in India any further and as a Christian cannot live in peace and practise his religion. If he returned he could be taken away by RSS thugs or Muslims and murdered.
25. The applicant made written submissions and enclosed some press articles relating to the situation of Christians and particular incidents which have occurred in various states in India.
26. The applicant attended an interview with the delegate and supplied the delegate with a copy of his marriage certificate and some of his educational certificates.

Application for Review

27. The applicant applied for review of the delegate's decision to refuse to grant a protection visa.

Evidence Given at Hearing

28. The applicant appeared at a hearing before the Tribunal to give evidence and present arguments. He was assisted at hearing by an interpreter of the Malayalam (Indian) and English languages.
29. The applicant brought his passport to hearing and a copy is held on the Tribunal file.
30. After I gave a general introduction explaining the purpose and conduct of the hearing I asked the applicant a series of questions about his personal background and claims. I emphasised that as I was taking a fresh look at the application he should give me a detailed and accurate account of those matters.
31. The applicant gave evidence that he was in his 30s and had been born in Town 1 village, District A in Kerala State. He is married and has one child. He stated that his parents were deceased but he had siblings living in India. He grew up in a Christian family and attended church on a regular basis. He attended school in Kerala, finishing high school. After he left school he lived at home with his family and did not work until he took on a traditional fishing job working with his family. All members of his family work in the fishing industry.
32. The applicant stated that he worked in the fishing industry over a decade. On one occasion he recalled there were problems between groups of fishermen at sea which affected the number of fish caught by his group. He explained that there were Muslim groups and Christian groups of fishermen and sometimes they fished in the same waters. If his group and a Muslim group were in the same catchment area, he claimed that the Muslim groups would often tell his group to go away. He stated that his group had problems at sea which often ended in physical fighting and on one occasion he was beaten by Muslim fishermen who dominated the fishing industry. I put it to him that there were large communities of both Christians and Muslims living in Kerala. He stated that the Muslims were in the majority in the fishing community.
33. He gave as the reason for the dispute the fact that Muslim fishermen objected to the Christian fishermen giving a lower price on the fish to poor women in the community. The Muslim fishermen did not want to sell at lower prices so this created conflict between the groups on a day to day basis.
34. He stated that he and his family used to operate a small motor boat. He claimed that there were often physical fights at sea. When I questioned him as to how these fights occurred he stated that when they were out at sea they would speak to people on other boats because there were a large number of small boats jammed side by side. He stated that the Muslim groups were always shouting and opposing them and would hit them with their oars. He stated that the disputes were generally about where each group was fishing. I put it to him that these disputes appeared to be about fishing territory and not religion. He could have as easily had a dispute with other Christians who objected to his presence. He disagreed.

35. He stated that the problems at sea were sometimes followed by physical fights on land after the boats landed. He referred to two different harbours and claimed that fights went on there over a two month period in a certain year. He claimed that problems occurred when they reached land because the Muslims would come and harass them. I put it to the applicant my problem with his evidence was that he had given me a very general account of conflict in these areas and had not given me specific details of particular incidents and how he had been involved.
36. The applicant stated that he was caught by police and taken to a police station which was close to his village. The police released him on bail and told him to move away from the village or someone would kill him. His mother sent him to Tamil Nadu because he knew the Tamil language. Soon after he moved within Tamil Nadu to a town where he worked for about two months at one job and then in another. He spent several months there.
37. I asked the applicant why police had arrested him and he told me that Muslims had been killed and police caught and questioned many people, including him. He said many people would have been caught. I put it to him that his story was not very clear to me. Despite asking him to give me his story step by step, he was not able to clearly explain to me what had happened to him at this time.
38. In trying to assist him tell his story I put it to him that he appeared be claiming that in this particular year he was arrested after a murder, released and then went to Tamil Nadu for several months. I asked him to tell me then what happened. He stated that later in that year his relative arranged for him to obtain a visa for Country A. He obtained a work visa and arrived in Country A. After the visa had elapsed a relative told him it was not safe to return so he stayed and worked in Country A in a store.
39. He told me he wanted to return home but the situation was not good; there were Muslims looking for him and it was not safe to him to come home. I asked him why the Muslim fishermen would be looking to him and he claimed that the Muslims had the upper hand in Congress at that the time and they had influence at police and government level. He was told he would have problems if he returned.
40. I put it to the applicant that he had been living and working in Country A for a number of years and wondered why he did not apply for protection during those years. He told me that he had intended to come back to India and was not interested in staying in Country A. The only reason he stayed was because his relative had told him not to return. He decided to return to Kerala when the political situation had improved with a change in government. He claimed he the opposition group had influence in the previous government but not on the current government.
41. I put it to him that the current CPI-M coalition government took power in 2006 and that it had taken him a long time to decide to come home after the government had changed. He stated his return was based on his relative's advice otherwise he would have come home earlier to see his mother who was seriously ill and died in the mean time.
42. The applicant told me that when he returned to Kerala he married shortly after he arrived home. He stated that he knew the girl earlier and liked her and his family had arranged for him to come home before the wedding. After he and his wife married he

moved his wife's parent's home in a neighbouring village several kilometres from his home village.

43. He told me he did not go back to work as a fisherman as he became involved in church related activities. His wife worked and he had saved money in Country A so he and his wife supported themselves from her income and his savings. His wife and her family were also involved in many Church activities.
44. *The applicant first came to Australia on a temporary visa, the specific details of which have been omitted in accordance with section 431 of the Migration Act.* He told me that as soon as he got his visa he made a decision that once he got to Australia he did not want to return to India Even though he told the people who organised the visa he would return he did not have any intention of returning to India.
45. I asked the applicant why he decided to leave India permanently. He told me that he left because the Muslims were encroaching on the land and would not pay a reasonable market price for the land. When asked to clarify, he stated he was in a group who decided that people should not sell their land except for a reasonable price and this caused problems in the local community. He claimed that the Church was involved in this group. He claimed that the problem arose from a quarrel between his group and the opposition party. The police came and arrested him and took him to the police station. They took his identity card and on one occasion they took him to the head quarters at Town 2 The police officer in charge had a lot of power and influence and was allied with the Muslims involved in the land dispute. When I asked the applicant if he had any evidence of his arrest or if it could be verified by the police he claimed that there would be no record of his arrest. He claimed he had been arrested because he had been talking about land matters and the Muslims wanted to intimidate him and wanted people to be pressured into selling their land.
46. I put to him that he had not clearly explained what he meant when he spoke about the land dispute. I asked him to explain his role in preventing the expansion of Muslims into Christian areas. He stated he had a meeting with land buyers and with two local Hindus who were negotiating the arrangements. He stated that a market price had to be paid for the land and the Hindus also talked in their favour but it turned out they were on the other side. He stated there was a meeting with a number of people attending and that members of the meeting had no objection to going ahead with the sale as long as they were paid a market price. The Muslims did not want to pay a market price for the land.
47. I asked him how the police became involved in a land dispute and he claimed that people had bribed police to arrest him. He claimed that he was kept in the police station for a few days and during that time he saw the same Muslim landlords who had been involved in the land disputes. They were talking to police at the station. He stated that he and two other people were raped by these people in the police station. These people were Muslims from a neighbouring village. He claimed that they did this because they wanted to try and insult and humiliate the applicant into giving in to their demands for the purchase of land.
48. He claimed the police were present during the assault and did not take any action to protect him during the time he was held in detention. He was told by police that he would need to pay a bribe of 15,000 rupees to be released. He told his wife who found

the money and paid the bribe to obtain his release. He was not charged with any offence but was told to leave the area.

49. He claimed after he was released some people took him to the local hospital which was Hospital X near Town 1. He claimed that the hospital provided medical treatment for his pain and his beatings and was kept in hospital for 2 days. I asked him whether he had any evidence that he had been treated in this hospital and he stated that he had a receipt but did not think to bring it with him. I asked him whether he would give the Tribunal authority to write to the hospital to obtain a copy of his medical records and he agreed. He claimed after his discharge he stayed at home because he was too ashamed to leave the house and felt he could not complain to anybody about what had happened to him.
50. I put it to him that the country information indicated that Kerala State provided a number of ways which people could lodge complaints and the State provided a means of complaining against the illegal actions of police officers. He stated that he did not do that because he feared being exposed to further harm and because of his shame and fear.
51. I put it to him that if he did not wish to take further action or live in his village in Kerala he could move to another part of Kerala or India. I put to him that his problem appeared to be confined to his local area and he could move elsewhere. He stated that Christians have problems in other areas and his limitation was his language and not being able to adapt to another situation. It may not be suitable to move with his wife as they were a newly married couple. I told him that I was not putting to him that it would be convenient to move, but that if he felt unsafe and wanted to seek protection he could easily live in another part of India. He stated he had no idea about where he could go and he had no means of support. I put it to him that the country information indicated that Kerala had a large Christian population and that he could move and live in another part of Kerala if he did not wish to live in the area of Town 1. He stated that the Muslims had threatened to kill him and that they would catch him wherever he went. They wanted to eliminate Christians. I asked him why this group was targeting him and he stated because they were looking at the future benefits in acquiring land around the harbour areas. He claimed he had become an obstruction to them because he was working for the church and did not want anybody to exploit poor people in the sale of their land.
52. He stated that he was ashamed to return to his local area because he had been sexually assaulted. He also stated that Muslims were still active in that area and were regarded as his enemies. I again put it to him he did not need to go back to that area. He stated they had given him a warning that even if he went anywhere else he would be found and harmed. Consequently he could not live anywhere in Kerala. I asked him why he could not move to Tamil Nadu as there was a Christian community located in Tamil Nadu. Further the government of India promoted religious tolerance and that the southern states of India were regarded as the most tolerant of all the Indian States. He stated that there was no suitable employment and he might be recognized and at risk in Tamil Nadu. I put it to him that recent incidents of sectarian violence were isolated incidents in a very large country. He stated that he had no idea which place would be safe for him and that he was concerned with getting a job and the loss of his family. He had stayed sometime in Tamil Nadu and there were ongoing problems and he had only worked in odd jobs.

53. I put it to him that it might appear that he had come to Australia, not for safety, but for financial reasons. He disagreed with this; he said he had brought money from home, had no job in Australia and safety was the only issue. I asked him to explain to me why he feared returning to India and how such fear was for a reason set out in the Convention. He stated that he feared harm because of his religion and was ashamed because people recognized him as someone who had been sexually assaulted.
54. I put it to him that Kerala is regarded as the most tolerant of all the Indian States in relation to religion, the state government was a Communist led alliance and was well supported by the Christian community. There were no reports of conflict between Christians and Muslims in Kerala and State authorities acted to protect all residents from harm. The state had a number of ways in which citizens could take action to complain about grievances. The applicant stated that if he had made a complaint a party would come to know and related political groups could come to him to harm him. Many people will find out about what happened and could provoke other people into taking action against him even in his own home.
55. I put it to him that there were no media reports that the incidents he had outlined had occurred as claimed. He stated this was because they did not report these things in the media. I put it to him that I had some difficulties with his story as he had nothing to support his account of events and the independent information suggested that, other than for some isolated incidents, Kerala was a religiously tolerant state. Further his story had no specific details and his evidence was vague.
56. The applicant gave me the name of the hospital near Town 1 in which he claimed he had been treated, the date of his admission and provided written consent to the release of medical information.

Invitation to Comment/Respond to Information s424A

57. Following the hearing the Department of Foreign Affairs made enquiries as to the location of the hospital referred to by the applicant at hearing with a view to requesting a release of medical information. After making several enquiries DFAT could not locate the hospital described by the applicant.
58. The Tribunal wrote to the applicant with an invitation to comment on or respond to information which would, subject to his comments or response, be the reason or part of the reason for affirming the decision under review.

The particulars of the information were:

“On [date] the Department of Foreign Affairs and Trade advised the Tribunal of the following information

Q – Please ascertain whether there is [Hospital X] located in the area of [Town 1] in Kerala.

2. DFAT spoke to the following people, none of whom were aware of the existence of an [Hospital X] in Kerala.

- Head Clerk, Town 1 Gram Panchayat (the Gram Panchayat is the local government body).
Not aware of any hospital by that name. Aware there was one [health centre] in Town 1

- Sister of the [name] Convent. [*Details of the convent have been omitted in accordance with section 431 of the Migration Act*]. Was not aware of any [Hospital X]
- District Medical Officer – Indian Systems Medicine, [District A] [Town 1] falls within [District A]. Their office did not have any record of [Hospital X] in [Town 1]
- Clerk to the District Medical Officer, [Town 1] Conducted a check of records and stated that there was no [Hospital X] in [Town 1]
- Head Clerk, [Town 1] Community Health Centre. No record of an [Hospital X].
- Kerala Government Department of Health website has no entry for [Hospital X] This website lists all registered hospitals in Kerala.

The information is relevant because at the hearing held on [date] you gave evidence that you were assaulted whilst in police custody and that after the assault you were admitted to [Hospital X], [Town 1] on [date] and were treated at hospital for injuries sustained during your detention. You gave the Tribunal written permission to request medical information from the [Hospital X], Town 1 to verify your claims.

The information set out above suggests that the evidence you gave at hearing was not truthful because there is no [Hospital X] in [Town 1]

If the Tribunal considers that your evidence is not truthful it may find that you have not been assaulted and injured in police custody and you have not been mistreated for any Convention related reason in Kerala. If the Tribunal considers that you have not been assaulted as claimed it may find that you will not face any chance of persecution if you return to India now or in the foreseeable future.

Further, if the Tribunal considers that your evidence regarding the assault in police custody is untruthful it may consider that all your evidence regarding your claims for refugee status may not be truthful and that your evidence lacks credibility.”

59. The letter inviting the applicant to comment was returned to the Tribunal by the postal authorities as unclaimed mail.

Independent Information

60. Kerala is frequently represented in the media as one of India’s most peaceful and tolerant states in terms of the relations between resident Hindu, Muslim and Christian communities.
61. In October 2008, the Indian social activist Aruna Roy argued that Kerala, with “almost equal numbers of Hindus, Christians and Muslims” was home to a “visible pluralism” which, in the context of the violence which then affected Orissa state, should serve as a model for the rest of India.

Keralite society left an extraordinary legacy, which has brought in literacy, social sharing and human development into the lives of all its citizens. But the visible pluralism is striking.

Kerala has almost equal numbers of Hindus, Christians and Muslims. As you motor down the road, with green all around, you see a dream of what the rest of India should be. Marta Mary Street leads you to Akbar technology and Ramya Sweets.

There are advertisements for the Patriarch of the Syrian Christian Church’s visit standing cheek to jowl with the Hindu temples and the mosques, which dot the ride between Cochin and Trivandrum The men are all in their dhotis, worn like a lungi

and their white shirts, difficult to distinguish unless there is an occasional Muslim cap. The women are more distinct because of the dress code now, having become a contentious issue. Nevertheless, all communities have high literacy rates even amongst women. No one covers their face, irrespective of the religion they belong to (Roy, A. 2008, 'Kerala deserves much better', *DNA News*, 24 October –, see: Roy, A. 2008)

62. In January 2004 Dr David Reynolds of the Center for Urban Studies at Wayne State University referred to Kerala as “a haven of tolerance and coexistence”; observing that: “While India as a whole has experienced significant Muslim-Hindu tensions, Kerala’s Christian and Muslim minorities live peacefully with the Hindu majority”. Numerous news articles were located which reported on the peaceful celebration of Christian festivals in Kerala by its Christian populace and even by members of the wider Kerala population. (Reynolds, D. 2004, ‘Little Cash, Lots of Riches’, *Yes Magazine*, Summer <http://www.yesmagazine.org/article.asp?ID=871>)
63. In 2003 a cultural studies scholar from New Zealand, Dr Peter Raine, argued that “[h]armony between seemingly divergent religious groups appears to be the norm” for Kerala’s Hindu, Christian and Muslim communities. Raine finds that: “Very few serious conflicts occur owing to religious differences”; and that: “Not only is there very little inter-religious rivalry, the different communities even share for their respective religious festivals paraphernalia such as decorated umbrellas, musicians and even elephants” Of the Muslim and Christian fishing communities the report states: “Each morning, Muslim fishermen visit the local teashop run by their Hindu neighbour, to chat and exchange stories after a hard night’s work. Christian fishermen are not excluded”. According to this article the primary problems affecting the Kerala social fabric have less to do with religion that with “increasing environmental pollution and degradation, high unemployment rates among the youth, burgeoning population, poor income distribution, and increasing political disharmony”. The article appeared in India’s *Frontline* magazine.; Raine, P. 2003, ‘A different image’, *Frontline*, vol.20: no.26, 26 April / 9 May <http://www.hindu.com/fline/fl2009/stories/20030509000106600.htm>; Other references George, S. 2007, ‘Chill, cakes and carols...Kerala peps up for Christmas’, *Hindustan Times*, 22 December <http://www.hindustantimes.com/storypage/Print.aspx?Id=f248dd19-7e01-462d-a74c-00ddb3727d6f>; ‘Mourning for some, celebration for others’ 2006, *IndiaBlitz.com*, 14 April <http://www.indiablitz.com/63747/Mourning-for-some-celebration-for-others.htm>; ‘Christmas brings back cheer to market’ 2008, *The Hindu*, 27 December <http://www.hindu.com/2008/12/27/stories/2008122756321500.htm>; ‘Catholic Church celebrates Alphonsa’s canonisation’ 2008, *The Hindu*, 13 October <http://www.hindu.com/2008/10/13/stories/2008101356541300.htm>)

Violence in Fishing Communities

Country information relating to Violence in fishing communities had been deleted in accordance with section 431 of the Migration act as it may serve to identify the applicant. The Country information refers to some violence and disputes between fishing Muslims and Christians in various fishing communities in Kerala on occasions over the past two decades.

Recent Sectarian Conflict

64. There have recently been reports of anti-Christian attacks spreading to Kerala after an outbreak of violence in Orissa state in 2008 saw flare ups in a number of locations across India News reports presented the spread of the violence to Kerala as an indication of the seriousness of the Hindu–Christian tensions that affected India at the time. A report in *The Hindu* noted that the Safdar Hashmi Memorial Trust had “issued a statement expressing distress over attacks on Christians, stating that: “the saffron brigade is concurrently orchestrating a mass campaign of bigotry and lawlessness that began in Orissa and has now spread to Karnataka and even threatens hitherto tolerant and peaceful Kerala” (“NCM team for Karnataka’ 2008, *The Hindu*, 17 September <http://www.hindu.com/2008/09/17/stories/2008091761051600.htm>; ‘3 churches attacked in Karnataka’ 2008, *Times of India*, 22 September http://timesofindia.indiatimes.com/India/3_churches_attacked_in_Karnataka_/rssarticle/show/3510970.cms; ‘60 dead in Indian anti-Christian clashes’ 2008, *The Age*, 18 October <http://news.theage.com.au/world/60-dead-in-indian-antichristian-clashes-20081018-53e2.html>).
65. Media reports note that representatives of Kerala’s state government – a coalition group led by the by the CPI-M – have condemned the outbreaks of anti-Christian violence and have promised to have police track down the perpetrators of the Kerala church attacks. On 22 September 2008 it was reported that “CPI(M) Kerala Secretary Pinarayi Vijayan today said the Left Democratic Front (LDF) government...was committed to book the culprits behind the attacks on minority institutions” and that “‘Sangh Parivar’ groups, who target minority communities, should be dealt with sternly”. It has also been reported that: “The government of the Indian state of Kerala has offered to shelter 56 refugees from Orissa, most of whom had fled the state following threats and beatings by Hindu mobs avenging the murder of a Hindu leader”(‘LDF govt. committed to peace in Kerala: CPI(M) Secretary’ 2008, *webindia123.com*, source: *United News of India*, 22 September <http://news.webindia123.com/news/articles/India/20080922/1059946.html>; Varghese, R. 2008, ‘Orissa Christians find shelter in Kerala state’, *Christian Today* website, 3 November <http://www.christiantoday.com/article/orissa.christians.find.shelter.in.kerala.state/21796.htm>)

State Government - Kerala

66. Kerala’s most recent state government elections took place in May 2006 and ended as a victory for the Left Democratic Front (LDF) coalition. Led by the Communist Party of India–Marxist (CPI-M) the 2006 LDF coalition also consisted of: “Communist Party of India, Janata Dal-Secular, Kerala Congress-J, Revolutionary Socialist Party, Nationalist Congress Party, Indian National League [a Muslim-based political party], Kerala

Congress-S and Congress-S”. News reports have noted that the May 2006 state election result continued a trend wherein the Kerala electorate has swung back-and-forth between the LDF and the UDF at successive elections. It is also worth noting that the INC and the CPI-M, though opponents in Kerala state politics, have until recently been partners at the national level in the INC led United Progressive Alliance (UPA) coalition. This partnership ended in June 2008 when the CPI-M, along with four other left wing parties, withdrew its support from the INC led UPA over the terms of a nuclear energy deal being negotiated with the United States. (Muraleedharan, N. 2006, ‘2006: Political conflicts in Kerala’, *Rediff.com*, 20 December <http://in.rediff.com/news/2006/dec/20year.htm>; Lype, George 2006, ‘Kerala: Where change is static’, *Rediff.com*, 11 May)

67. A February 2009 *Hindustan Times* article reports that: “Traditionally, Christians were UDF supporters. But in the last Lok Sabha and assembly elections, they overwhelmingly supported the LDF, helping it to make deep inroads into the Christian heartland” During the 2006 Kerala Assembly elections that brought the CPI-M back into government *The Hindu* reported “that exit poll surveys “found a 7 to 9 per cent swing in the Christian votes in favour of the LDF.(Sarkar, A. & Babu, R. 2008, ‘Bengal, Kerala units fear losing 10 LS seats each’ 2008, *Hindustan Times*, 27 July <http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=c1f09790-5c36-4cc2-a72a-83e774fe17bd>; Exit polls predict clear majority for LDF’ 2006, *The Hindu*, 4 May <http://www.hindu.com/2006/05/04/stories/2006050413040400.htm>)
68. The USSD Country Report 2007 stated “The law provides for an independent judiciary, and the government generally respected this provision in practice: however, serious problems remained. In Jammu and Kashmir, members of the judiciary were subject to threats and intimidation by insurgents and terrorists.”
69. The International Religious Freedom Report (2007) notes
“The Ministry for Minority Affairs, the National Human Rights Commission (NHRC) and the National Commission for Minorities (NCM) are governmental bodies created to investigate allegations of discrimination and make recommendations for redress to the relevant local or national government authorities. Although NHRC recommendations do not have the force of law, central and local authorities generally follow them. The NCM and NHRC intervened in several high profile cases, including the 2002 anti-Muslim violence in Gujarat and other instances of communal tension, the enactment of anti-conversion legislation in several states, and incidents of harassment and violence against minorities.” **[2b] (Section II. Status of Religious Freedom)**

...The Government continued in its efforts to improve religious tolerance and build communal harmony. The National Human Rights Commission and the National Commission for Minorities continued to promote freedom of religion and focused on human rights problems in their annual reports, encouraging judicial resolution where possible. (USIRF 2007 Report, September 2007) **[2b] (Section II. Improvements and Positive Developments in Respect for Religious Freedom)**
70. There is a Kerala State Human Rights Commission (KSHRC). The website for the KSHRC is <http://www.kshrc.kerala.gov.in/home.htm> The Government of Kerala website also lists a number of government agencies dealing with complaints and grievances.

71. The relationship between the CPI-M and the Catholic Church is complicated. Whilst the seeks to woo the Christian voter it also has had clashes over school and youth movement policies, however, both Christian and Muslim voters are seen as important to its electoral situation. (Kerala Latin Catholics sever ties with Congress' 2005, *The Hindu*, 20 June <http://www.hindu.com/2005/06/20/stories/2005062004680700.htm>; 'Bishop slams CPM after attack by its students' wing on college' 2008, *Gulf Times*, 31 March; Krishnakumar, R. 2001, 'A record of sorts', *Frontline*, vol.18: no.11, 8 June <http://www.hinduonnet.com/fline/fl1811/18110240.htm>)

FINDINGS AND REASONS

72. The applicant claims to fear persecution from members of the Muslim community in Kerala because he has been involved in a Christian group opposing the unfair acquisition of Kerala coastal land by members of the Muslim community. He claims that in a recent year he became involved in a violent dispute between Muslim and Christian groups over land in the coastal areas. Some members of the Christian community were injured in the dispute. He claimed that members of the Muslim community were trying to unfairly pressure poorer landowners into selling their land for less than market value. As a result of his involvement he was detained by police. Whilst in detention he was mistreated by members of the Muslim community because of his involvement in the group opposing the unfair acquisition of land. He claims that the police encouraged the mistreatment and failed to protect him from harm. After he was mistreated in detention he returned to his home but decided to leave India and was able to arrange a visa for Australia. He claims that if he returns he fears he will be harmed by members of the Muslim community and will not be protected by police.
73. I have considered the claims set out in the application for a protection visa and the application for review, the oral evidence given at hearing, the applicant's submissions and the documents given to the Tribunal in support of the claims.
74. I am required to determine whether the applicant has a well founded fear and if so whether what he fears amounts to persecution for a Convention related reason. My task is to consider all the evidence, make findings on material questions of fact and then to give reasons for my decision.
75. Having seen the applicant's passport and heard his evidence I accept that the applicant is a citizen of India.
76. When determining whether an applicant is entitled to protection in Australia I must first make findings of fact on the claims he or she has made. This may involve an assessment of the credibility of the applicant. When assessing credibility, the Tribunal must be sensitive to the difficulties often faced by refugee applicants and should give the benefit of the doubt to those who are generally credible but unable to substantiate all of their claims.
77. However, I am not required to accept uncritically any and all allegations made by an applicant. In addition, I am not required to have rebutting evidence available to me before I can find that a particular factual assertion by an applicant has not been made out. I am not obliged to accept claims, which may be plausible and coherent, but are inconsistent with the independent evidence regarding the situation in the applicant's country of nationality. (See *Randhawa v MILGEA* (1994) 52 FCR 437 at 451, per

Beaumont J; *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 per Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.

78. I did not find the applicant to be a credible witness. The applicant's account of events was vague, generalised and confused. He was not able to give a detailed account of the circumstances and events surrounding his claims even when I told him that it was important to give specific details.
79. I accept that the applicant is now in his 30s, is married with one child and that his wife and child are living in India. I accept that after the applicant left school he worked in the fishing industry with his family
80. The applicant's written claims included a claim that after he left school and for about a year he travelled with Church fathers and was engaged in charitable work with Dalits and Untouchables. The applicant did not give this evidence at hearing and whilst I accept that he may have been involved in some minor way in local Church activities I do not accept that he travelled around Kerala with the Church fathers or that had a major role in working with Dalits in Kerala State.
81. I accept that during the time he worked in the fishing industry the local fishermen in Town 1 and other fishing villages were involved in various fishing disputes and that sometimes these disputes involved fishermen from different religious groups. This is consistent with the available country information suggesting that such disputes arose from time to time. I do not, however, accept that a serious dispute arose in the Town 1 area between rival Christian and Muslim groups at the time the applicant claims it did. There is no country information which suggests a serious dispute in the Town 1 area at that time and the applicant's account of events was vague and overly generalized. I do not accept that the applicant was arrested on suspicion of involvement in the deaths of Muslim fishermen in the early 2000s and that he was released on bail. He could not give a detailed account of this claim and I do not accept it.
82. I accept that the applicant moved to Tamil Nadu for a period of some months in the early 2000s and that he only found casual work during this period of time. However, as I do not accept that he had been arrested in Kerala for reasons of his suspected involvement in sectarian fishing disputes I do not accept that he moved to Tamil Nadu because he feared harm from Indian authorities or members of the Muslim community. I consider that he moved to Tamil Nadu to look for work.
83. The applicant gave evidence which I accept that one of his relatives made arrangements for the applicant to travel to Country A on a visa which was valid for a period of several months. He stated that he was designated as a certain professional and this was the basis upon which the visa was granted however he did not have the skills of this profession. His Country A visa expired after several months. Notwithstanding the fact that he did not have a valid visa he stayed and worked in Country A until he returned to India He did not apply for refugee status whilst he was in Country A even though he was without a valid visa for several years.
84. I do not accept that the applicant left India in the early 2000s due to a fear of persecution and I do not accept he feared he would be persecuted in India at any time before he returned several years later. I find the fact that he did not apply for protection in Country A during his stay indicates that he did not fear returning to India during that

period of time and that the reason he stayed in Country A was to improve his economic circumstances. Further, there is no independent information before me suggesting that the government of Kerala did not provide adequate and reasonable state protection for its Christian residents during this period of time.

85. I do not accept his explanation that he returned after his brother told him it was safe to return because of a change in government in Kerala. The country information indicates that the government changed in May 2006 well before he took steps to return. I consider that he moved to Country A to obtain work and that he eventually returned to India after his family had arranged a marriage for him in Kerala. He was not able to return to Country A after his marriage because his visa had expired some years before his return.
86. I accept that when the applicant returned to India he may have become involved in some church related activities in or near Town 1 however I do not accept that he became involved in a lobby group which was involved in negotiations relating to land disputes between Christian landholders and members of the Muslim community who were seeking to purchase coastal land at less than market value. His evidence on this aspect of his claim was confused, incoherent and implausible. He was not able to provide any clear detail about the activities of such a group and his own part in those activities. He referred in general terms to the subject of the dispute but was not able to give evidence showing he had any direct knowledge of the nature and circumstances of the dispute.
87. As I do not accept that he was involved in such a group I do not accept that if he returned to India he would face a real chance of persecution by members of the local Muslim community in Kerala for reasons of his involvement in a group advocating for the rights of poorer Christian landholders in Kerala. Further I do not accept his claim that police in Kerala were complicit in his claimed mistreatment.
88. I do not accept the applicant's claim that he was taken to a police station, questioned, and then sexually assaulted and injured by members of the Muslim community in the presence of and with the consent of the police officers.
89. The applicant gave evidence that after he was beaten and sexually assaulted in detention he was admitted to hospital in or near Town 1 for treatment. He gave the Tribunal the full name of the hospital and the date of his purported admission, however, after making several enquiries in India the Tribunal could not find any evidence of the existence of such a hospital. The applicant claimed that he had a receipt from the hospital but took no steps to supply the Tribunal with a copy of such a receipt. I do not accept that the applicant was mistreated as claimed and I do not accept that he was treated for any injuries on the occasion as claimed
90. The applicant claimed that the police officer in charge of the station was influenced by Muslim landlords and members of the Muslim community. I do not accept this evidence and I did not find it plausible. As put to the applicant at hearing there are a number of avenues for complaints against police officers in Kerala I would have expected that if the applicant had been assaulted in the manner claimed that he would have made a complaint to the relevant authorities or to persons in the Catholic Church; however, his evidence was that he made no complaint to anyone regarding his treatment.

91. In his written claims the applicant referred to his fear of the extremist Hindu groups such as the RSS. He did not repeat these claims at hearing and he maintained at hearing that he feared the Muslim members of the Kerala community and the lack of state protection. Accordingly I do not accept that there is any basis for his written claim that he faces any chance of harm from Hindu groups.
92. I accept that the applicant is a Catholic and has been a member of the Catholic Church all his life. As the applicant claimed that Christians have been subject to attacks in India, I have also considered the situation for the applicant as a Catholic if he returned to India. I consider that the country information indicates and I accept that there is a large Christian community in Kerala and that the state has provided a reasonable level of protection to all its religious minorities. The reports indicate that in 2008 there have been a few incidents of damage to some Christian churches and to some isolated attacks on Christians in Kerala, however, generally the state enjoys a harmonious relationship between religious groups and a high level of religious tolerance. The evidence also indicates that the state authorities encourage religious tolerance and provide a reasonable level of state protection to all its residents on a non discriminatory basis. I consider that if the applicant returns to India now or in the foreseeable future he will not face a real chance of persecution for reasons of his Christian religion.
93. For all the reasons set out above I am not satisfied that the applicant has a well founded fear of persecution for any Convention related reason.

CONCLUSIONS

94. 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

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

Louise Nicholls
Member

4 June 2009

<p>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. PMRTJA</p>
