

1003470 [2010] RRTA 629 (28 July 2010)

DECISION RECORD

RRT CASE NUMBER: 1003470

DIAC REFERENCE(S): CLF2010/16093

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Peter Tyler

DATE: 28 July 2010

PLACE OF DECISION: Melbourne

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] August 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] February 2010. The delegate decided to refuse to grant the visa [in] May 2010 and notified the applicant of the decision and his review rights by letter [on the same date].
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 [in] May 2010 for a 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 element 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 relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. According to the Department's records the applicant first entered Australia [in] January 2007 as the holder of a Student Visa granted [in] November 2006. A subsequent Student Visa expired [in] February 2009. [In] March 2009 the applicant applied for a further student visa and [in] June 2009 a delegate of the Department refused to grant the further visa, as it had been notified by the applicant's education provider that his attendance was unsatisfactory. The applicant appealed the delegate's decision to the Migration Review Tribunal which, on 1 October 2009, found that it did not have jurisdiction in the matter.

The Application

21. In his application for protection the applicant claimed that he came from a family that was involved in the Congress Party and that he had been engaged in politics since his school days. He opposed the Bharatiya Janata Party (BJP) because of its extreme religious views and when he visited India in August 2009 he became involved in political activities. He was suddenly attacked and beaten by members of the BJP and sustained injuries for which he required medical treatment. A local BJP Member of Parliament reported the incident to the police who are now looking to arrest him as they believe he was the main person involved in the incident. He claims that he returned to Australia because of his fear and to avoid arrest. He claims that if he returns to India members of the BJP will humiliate him and that he will be persecuted by the police. He believes this will happen because he is a member of the Congress Party and the BJP is in power.

The Review

22. [In] May 2010 the applicant provided the Tribunal with a copy of a letter on Punjab State letterhead purporting to be from [Politician A] and dated [in] August 2009. The letter states that the applicant and his father are involved in the Congress Party, were attacked by members of the BJP in August 2009 and that the police are looking for the applicant to arrest him. The applicant also provided a copy of a medical report dated [in] August 2009 stating that the applicant had injuries to both legs and prescribing pain-killers for him.
23. The applicant appeared before the Tribunal [in] July 2010 to give evidence and present arguments. The Tribunal also received oral evidence from [name deleted: s.431(2)], who is the applicant's Father. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
24. The applicant told the Tribunal that he was [age deleted: s.431(2)] having been born on [date deleted: s.431(2)]. He was born in Amritsar in Punjab, India. He claims to speak English,

Punjabi and Hindi. He is of the Sikh faith and is single. He first arrived in Australia [in] January 2007 and has lived with his sister in Sydney and brother in South Australia. Prior to arriving in Australia he was living with his parents in Amritsar and had completed Grade 12 at secondary school.

25. The applicant told the Tribunal that the contents of his application were correct other than he wished to add that he had been receiving threatening calls from unknown callers since about September 2009. He said he has had up to 40 calls, but has only answered them on four or five occasions. He said that he has changed his phone number twice; once in December 2009 and the other in February 2010. He said that since changing his phone number he has had six or seven calls. He said that he did not know whether the unanswered calls are from his enemies or from other sources. The Tribunal asked him to explain how he thought the callers obtained his new numbers and he said that he did not know.
26. The applicant told the Tribunal that he had been a member of the Congress Party since he was about 15 years of age. He said he was a general member of the party and not an office bearer.
27. He said that the BJP and Shiromani Akali Dal (SAD) parties formed a coalition government within the State of Punjab and that the BJP is the senior member of the coalition. The Tribunal told the applicant that, according to its country advice, the SAD party is the senior member of the coalition and the applicant changed his evidence to confirm that SAD was the senior member of the coalition.
28. The applicant said that he had had no problems in India before August 2009. He said that the Congress Party lost power in Punjab during elections that were conducted in mid-2008 and he thought that the election was in the month of July or August. At that time he was living in Australia and did not participate in the election campaign.
29. The applicant returned to Punjab from Australia [in] August 2009 in order to holiday with his family.
30. [On a date in] August 2009 the applicant attended a rally in the village of [Village A] which is about [distance deleted: s.431(2)] kilometres from his home. He said that about 200 to 300 people attended the rally which was held in an open place on a farm property near the village. Both men and women attended the rally. The rally was addressed by the head of the local Congress Party in [Village A], [Politician A]. The applicant said that [Politician A] had previously been a member of parliament but that he had lost his seat in the 2008 election. The rally was also addressed by Captain Aminda Singh who used to be the Congress Party leader in Punjab.
31. The applicant went to the rally by motor vehicle. His father also attended along with about 50 other members of the Congress Party from his village.
32. As the car in which he was a passenger left the rally and drove out of the township of [Village A], a car came from behind and stopped their vehicle. Two other cars behind the car in which he was a passenger also pulled up and the occupants of the three cars dragged the applicant and his fellow passengers out of their car and attacked them with metal rods, which he also described as lightweight baseball bats, and wooden baseball bats. The applicant sustained injuries to his legs and back. He described the injuries as bruises. The other occupants of the car received head and facial injuries.

33. All of the occupants of his car were injured to the extent that they were taken to the hospital in [Village A], and he remained there for one day after which he returned to his home. The applicant said that he did not report the matter to the police because he was in hospital and because members of the BJP, who attacked him and his fellow travellers, had already reported the incident to the local police accusing the applicant and his group of actually starting the violence. He also said that other Congress Party members had reported the attack to the police on the day following the attack.
34. The applicant said that the police took the view that he and his group started the fight and therefore charged him, although he did not know on what charge. The Tribunal said that it found this to be a curious situation where he did not know what charge he was on and he said that he was charged with assault.
35. According to the applicant the cases against the other members of his group had been taken to court, but he did not know the result of the court case. He has not been in touch with the other members of his group since he has been in Australia. He said that if he returns to India he will be required to go to court. The Tribunal asked the applicant if he had received any summons in relation to the charges laid against him and he said that he had not.
36. The applicant told the Tribunal that he was arrested by the police on the day of the rally, to which the Tribunal responded that he had said that he went to hospital immediately after the fight with the BJP group and that he was in hospital for a period of one day. The Tribunal asked him to explain the apparent inconsistency in his suggestion that he was arrested on the day of the rally, but also that he had spent the day in hospital. The Tribunal again asked the applicant if he was arrested and he did not respond. The Tribunal put the question to him again and the applicant said that he was arrested by the police two or three days after discharge from hospital. He said that he was arrested by the [Village A] police and was held for a period of two days.
37. The Tribunal asked him why he had not mentioned his imprisonment in his statement in his application and he said that it was because he was not able to get the arrest papers to show the Immigration Department. The Tribunal again asked the applicant why he did not mention the arrest in his application and he did not answer.
38. The applicant said that he was gaoled in the police station in [Village A], along with his fellow Congress Party members who were caught up in the violence after the rally. The applicant said that he was not given any papers after he left the gaol.
39. The Tribunal told the applicant that according to its country information the police services in Punjab, although there are some problems, generally functions in an orderly manner. The Tribunal pointed out that it found it difficult to believe that the police could put him in gaol for a period of two days without informing him of the charges, and that this led the Tribunal to form the impression that the applicant was making up his story as the hearing unfolded. The applicant said that he was not making up any stories and the Tribunal asked him to explain how an orderly police service would conduct itself in the manner he describes. The applicant did not respond to the Tribunal's concerns.
40. The applicant said that he was not in contact with other members of his group and that he had only spoken to his father on two or three occasions since the incident. He says that he fears making calls back to his friends as his father told him that the police were looking for him.

41. The applicant said that a senior member of the BJP, [name deleted: s.431(2)], reported the incident to the police on behalf of the group that the applicant says attacked him and his friends. He also said that the police took statements from the other 15 people.
42. The applicant said that the BJP was in power in Punjab and has influence over the police therefore the police will harass him if he returns. He said that the police act in the interests of the party in power at the time and that the BJP appoints the police. The Tribunal pointed out that its information suggested that most of the senior police would have been appointed by the Congress Party during its term in office and it would be more likely that the early police supported members of the Congress Party. The applicant said that the SAD and BJP make the police act illegally and the Tribunal asked him did he have anything to support his view and he said that he did not.
43. The applicant returned to Australia [in] August 2009. The Tribunal asked him why he did not lodge his protection application until February 2010 and he said that it was because he did not know that protection was available to him.
44. Pursuant to Section 424AA, the Tribunal referred to documents on his Student Visa file indicating that his Student Visa had been cancelled because his education provider had reported that he had an unsatisfactory attendance record. The Tribunal further pointed out that the decision in respect of his appeal to the Migration Review Tribunal against the decision of the Department to cancel his Student Visa was handed down [in] October 2009. The Tribunal expressed the view that his lodgement of his protection application appeared to have been made because he had run out of options in terms of his other visa. The Tribunal told the applicant that subject to his response, it may form he view that he applied for protection solely for the purpose of migrating to Australia and therefore the Tribunal might find that he was not a refugee. The Tribunal offered the applicant an adjournment for the purpose of considering his response and after initially saying he required “nearly a day” he agreed that 15 minutes would be sufficient for him to consider his response. After the adjournment the applicant responded by saying that he did not lodge his Protection Visa application because he did not know that protection was available to him.
45. The Tribunal referred to a letter on file which purported to be from [Politician A] dated [in] August 2009. The Tribunal asked the applicant what the initials M.L.A. meant, and after some consideration the applicant said that it meant Member Local Area. The Tribunal asked the applicant did he know the name of the Punjab Parliament and he did not answer.
46. The Tribunal pointed out to the applicant that he had earlier told the Tribunal that [Politician A] spoke at the rally in [Village A] and that he was a former member of parliament who lost his seat in the last election. The Tribunal asked him how it was now that [Politician A] was purporting to be a member of the state parliament. The applicant did not respond. The Tribunal then asked the applicant what notice it should take of the letter and the applicant again did not respond to the question.
47. The Tribunal referred to the medical certificate which the applicant had provided concerning the injuries he sustained from the attack on him after the rally [in] August and asked him why, given that the applicant said he had sustained injuries to both his legs and his back, the medical report did not refer to injuries on his back, and he did not respond to this question. The Tribunal also pointed out that the medical certificate was dated [in] August 2009 when in fact the applicant claims to have sustained the injuries [three days prior]. The Tribunal asked the applicant to explain the discrepancy in the dates and the applicant did not respond.

48. The Tribunal then spoke to the applicant's father who said that he and his son, the applicant, had been involved in the Congress Party for 10 to 15 years. The applicant's father confirmed the applicant's evidence concerning the rally and fight [in] August 2009.
49. The applicant's father told the Tribunal that the applicant went to hospital for a couple of days; that he was arrested and the family had to bribe the police to facilitate his release; that the applicant did not go to gaol; that the applicant was arrested the day following the rally; and that the applicant was not charged with any offence arising out of the clash after the rally.
50. After speaking to the applicant's father the Tribunal, pursuant to Section 424AA, put to the applicant a number of discrepancies arising out of his version of events and those put to the Tribunal by his father. The Tribunal told the applicant that subject to his response, it may form the view that the applicant was not a credible witness, which in turn may cause it to doubt the truthfulness of his evidence as a whole, which may in turn lead it to find that he is not a refugee. The Tribunal offered the applicant time to consider his response but he elected to respond immediately. The Tribunal pointed out that his father had said that he was in hospital for two or three days, whereas the applicant said that he had been hospitalised for one day, and the applicant did not have anything to say. The Tribunal then pointed out that the applicant's father said that he did not go to gaol and the applicant said that he did go to gaol.
51. The Tribunal asked him why he had not mentioned the fact that the family had paid a bribe to facilitate his release from detention and asked the applicant why this was the case, and he did not respond. The Tribunal pointed out that he said that he was arrested on the day of the rally, whereas his father said that he was arrested the day after the rally, and the applicant did not respond. The Tribunal pointed out that in his oral evidence, the applicant said that he was charged with an offence, although he could not identify that offence, whereas his father told the Tribunal that he was not charged with any offence. The applicant did not respond to the question.

FINDINGS AND REASONS

52. The applicant claims to be a national of India and arrived in Australia on a Indian passport. The Tribunal accepts that the applicant is an Indian national and, for the purposes of the Convention, has therefore assessed his claims against India as his country of nationality.
53. The Tribunal observes that the mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is "well-founded" or that it is for the reason claimed. It remains for the applicant to satisfy the Tribunal that he or she satisfies all of the required statutory elements. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making, the relevant facts of the individual case will have to be supplied by the applicant himself or herself, in as much detail as is necessary to enable the examiner to establish the relevant facts. A decision-maker is not required to make the applicant's case for him or her. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (*MIEA v Guo & Anor* (1997) 191 CLR 559 at 596, *Nagalingam v MILGEA* (1992) 38 FCR 191, *Prasad v MIEA* (1985) 6 FCR 155 at 169-70.)
54. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make findings of fact on the claims he or she has made. This may involve an assessment of the applicant's credibility and, in doing so, the Tribunal is aware of the need and

importance of being sensitive to the difficulties asylum seekers often face. Accordingly, the Tribunal notes that the benefit of the doubt should be given to asylum seekers who are generally credible, but unable to substantiate all of their claims.

55. On the other hand, as stated previously, the Tribunal is not required to accept uncritically any or all allegations made by an applicant. In addition, the Tribunal is not required to have rebutting evidence available to it before it can find that a particular factual assertion by an applicant has not been established. Nor is the Tribunal obliged to accept claims that 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). On the other hand, if the Tribunal makes an adverse finding in relation to a material claim made by an applicant, but is unable to make that finding with confidence, it must proceed to assess the claim on the basis that the claim might possibly be true (See *MIMA v Rajalingam* (1999) 93 FCR 220).
56. The Tribunal finds the applicant to be a witness who lacks credibility. His evidence was inconsistent and lacked plausibility in significant respects, namely:
- The applicant claims that notwithstanding he has changed his phone number in Australia on two occasions, his enemies in India have been able to phone him. When asked to explain how this could happen, the applicant said he did not know. The Tribunal does not find it plausible that the applicant's enemies would have access to such information, as telephone records are very difficult to access other than by persons who can provide security details usually only known to the account holder.
 - Although the applicant claimed to have been a member of the Congress Party and active in politics, he did not know which of the parties in the coalition government was the senior partner and he did not know the name of the state parliament in Punjab.
 - His evidence was inconsistent as to the day on which he was arrested. He initially said that he was arrested on the day of the rally. When it was pointed out to him that he had said he was in hospital that day he said he was arrested 2 or 3 days later.
 - The applicant claimed that he was gaoled after the rally and his father said that he spent no time in gaol.
 - The applicant changed his evidence concerning whether or not he had been charged with an offence, and after being pressed by the Tribunal he said he was charged with assault. His father said that there were no charges laid against the applicant.
 - The applicant said that he was in hospital for 1 day whereas his father said that he was hospitalised for 2 to 3 days.
 - The applicant did not explain why in the letter from [Politician A], refers to the signatory as a member of parliament by using the title M.L.A. given that

the applicant had told the Tribunal that [Politician A] had lost his seat at the previous election.

- The applicant did not respond to the Tribunal's questions as to why the medical report did not refer to the injury to his back and that it was dated three days after the applicant claimed he was in hospital.

57. The inconsistencies, the unsatisfactory answers set out above and the applicant's failure to respond to a number of straightforward queries leads the Tribunal to believe that the applicant is not a credible witness, and that his claims have been contrived for the purpose of his protection visa application.
58. The Tribunal has given consideration to the letter from [Politician A] dated [in] August 2009. In his oral evidence at the hearing, the applicant said that [Politician A] had lost his seat in parliament at the previous election. When asked how it was that [Politician A] purported to still be a parliamentarian by using the title "M.L.A." the applicant did not respond. The Tribunal asked him what weight it should therefore give the letter and the applicant again failed to respond. In these circumstances the Tribunal gives the letter little weight.
59. The Tribunal has also considered the medical certificate dated [in] August 2009. The certificate refers to injuries to the applicants legs but does not refer to any injuries sustained to his back. The date of the certificate is three days after the applicant claims he was admitted to hospital for one day. When asked why the certificate did not refer to his claimed back injury and how the date of the certificate differed from the date of his admission to hospital, the applicant did not respond. The Tribunal considers the discrepancies as significant and when put to the applicant he failed to offer an explanation. The Tribunal has therefore given the medical certificate little weight.
60. Accordingly, the Tribunal does not accept that that the applicant was involved in politics in India; that he was beaten and injured after a rally [in] August 2009; that he was hospitalised for reasons of an attack on him; that he was arrested, goaled or charged by police because of his involvement in a fight with supporters of the BJP. The Tribunal does not accept that his evidence is plausible and therefore finds that he has not suffered serious harm in the past. Having accepted that the applicant has not been involved in politics in the past, the Tribunal does not accept that he will be involved in politics in the future or that there is a real chance that he will suffer serious harm in the future.
61. Accordingly, the Tribunal is satisfied that the applicant does not have a well founded fear of persecution within the meaning of the Convention if he returns to India, now or in the reasonably foreseeable future.

CONCLUSIONS

62. 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

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

