

1109879 [2012] RRTA 727 (16 August 2012)

DECISION RECORD

RRT CASE NUMBER: 1109879

DIAC REFERENCE(S): 30/7/1999 CLF2010/123664

COUNTRY OF REFERENCE: India

TRIBUNAL MEMBER: Christopher Smolicz

DATE: 16 August 2012

PLACE OF DECISION: Adelaide

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 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, applied to the Department of Immigration for the visa on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] September 2010.
3. The delegate refused to grant the visa [in] September 2011, and the applicant applied to the Tribunal for review of that decision.

RELEVANT LAW

4. 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. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom 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), or on other 'complementary protection' grounds, or is a member of the same family unit as a person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

Refugee criterion

5. Section 36(2)(a) 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 Refugees Convention.
6. 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.
7. 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, *Applicant S v MIMA* (2004)

217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.

8. 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.
9. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
10. 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.
11. 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.
12. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, and 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.
13. 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 being persecuted 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.
14. 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. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or

diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.

15. 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.

Complementary protection criterion

16. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
17. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
18. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

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.

Background

20. The applicant arrived in Australia [in] August 2010 travelling on an Indian passport in the name of [name and date of birth deleted: s.431(2)]. The applicant travelled on visa subclass UL 679 which was valid until [a date in] September 2010.
21. Information contained on the Department's file indicates the applicant also has the following known alias.
 - [Alias A], born [in the same year as the applicant, with no date or month specified]

- [Alias B], born [three years earlier than the applicant, but on the same day and month as the applicant]
- [Alias C] born [three years earlier than the applicant, but on the same day and month as the applicant]

22. According to information contained on the Department file the following timeline provides a chronology of the identities used by the applicant and his migration history:

- [In] July 1999 the applicant applied offshore for a Temporary Business Short Stay UC 456 visa using the identity of [Alias B].
- [In] August 1999 the Department refused the applicant due to non bona fides.
- [In] August 1999 the applicant was granted subclass UC 456 visa using the identity of [Alias C].
- [In] September 1999, the applicant arrived in Australia.
- [In] March 2004 the applicant approached the Department as a bridging over stayer and was subsequently granted a visa subclass WE 050.
- [In] April 2004 the Department monitored applicant's departure from Australia as a bridging over stayer.
- [In] August 2009 the applicant was granted a visa subclass UL 679 using his [current identity].
- [In] November 2009 the applicant entered Australia.
- [In] November 2009 the applicant's sponsor contacted the Department to enquire about the applicant's visa being extended so that the applicant could undertake study to further his prospects of employment when he returns to India. The application was denied by the Department.
- [In] December 2010 the applicant departed Australia.
- [In] July 2010 the applicant was granted visa subclass UL 679 using his [current identity].
- [In] August 2010 the applicant arrived in Australia.
- [In] September 2010 the applicant lodged a protection visa application which is subject of the review application.

Protection visa application

23. [In] September 2010 the applicant applied for a protection visa. The applicant declared the following:
- he was born on [date deleted: s.431(2)] in the town of [Locality 1], in the Indian state of Tamil Nadu
 - he is able to speak, read and write in Tamil and English
 - he married [in] 2005 and has [number of children deleted: s.431(2)].
 - his ethnic group is Tamil and his religion Islam
 - his occupation prior to coming to Australia was “[occupations deleted: s.431(2)]”
 - he travelled to Australia [in] 2009 to visit a family member
 - he was denied or refused an entry visa to the United Kingdom [in] October 2009.
24. The applicant’s substantive claims for a protection visa can be summarised as follows:
- The applicant claims that an anti-Muslim fundamentalist party called *The Hindu Front* (RSS) had caused violent clashes with the Muslim population. He claims they were responsible for the looting and burning of Muslim shops and businesses and attacks on Muslim farms.
 - The applicant claims that the police would take no action against the offending Hindus. Subsequently, the applicant and others would organise picket lines to bring attention to their plight. These protests regularly resulted in the police breaking up the picket line and arresting the protesters who were taken to gaol and remanded, sometimes for weeks without being brought before a court.
 - He claims that Hindus comprise 90% of the police force in the area. This fact along with the inherent corruption has led to a lack of police action being taken against the Hindu population. The applicant claims, however, that if Muslims do anything, they are arrested immediately.
 - This situation lead the applicant and the Muslim community to believe that the police will not protect them or their interests. He claims that the lack of police protection of the Muslim community has resulted in the loss of their land and businesses to Hindus. This has increased the tension between the Hindu and Muslim communities, resulting in the government appointment of an Indian Police Service (IPS) Officer to take charge of the local police force in an effort to combat the rising communal violence.
 - During the Muslim-Hindu riots in 1993 the applicant claims to have been [arrested] and held without charge for three and half days. After this incident, the applicant claims that the police would come to his house and arrest him whenever there was

any trouble between Muslim and Hindus. He moved to [location deleted: s.431(2)] in 1996 but after riots in November 1997 he returned to his home town.

- He joined the Students Islamic Movement of India (SIMI) after becoming interested in the group's rhetoric about the injustices of the Hindu government. He states that the main goal of the movement was to fight for the rights of the Islamic people in all aspects of life such as education, employment and religion.
- He became SIMI [office-holder] for [District 2] where his main task was to recruit young people to the movement and he was responsible for propaganda work. Another task the applicant claims to have carried out was travelling internationally to collect funds for SIMI. The applicant claims to have [travelled] on false passports supplied by SIMI.
- The applicant claims to have been arrested during riots in 1998 and was taken to [a] prison where he remained in custody without charge. During his time in prison he met other Muslim prisoners who claimed to have been held without charge for ten years.
- The applicant claims that he has been gaoled on 20 to 25 occasions since 1998.
- The applicant states that the "9/11" attacks in the USA and the suspected involvement of SIMI members in the attack on the Indian Parliament led to a severe crackdown on the movement and he feared for his life.
- In July 2008, the applicant claims to have visited [Mr D] in prison, a prisoner he met during his own time in gaol. The applicant claims to have [smuggled] a mobile phone into the prison. Prison authorities discovered the phone and [Mr D] revealed to the authorities that the applicant had given him the phone.
- The applicant claims that although he had used false name to register his visit, the prison has security footage of his image. The applicant went into hiding until he left for Australia [in] August 2010.
- The applicant claims that [in] July 2010 his house was raided by police. He claims not to have been at home but all his documents were taken.
- The applicant fears persecution at the hands of the Indian authorities due to his involvement in SIMI. He claims that SIMI members have been arrested all over India. He fears a recent upsurge in violence between Hindus and Muslim, believing that he will be target.
- He could not recall when he joined the SIMI but claimed to be a [member] for more than 10 years.
- He claims to have organised meetings, attended schools and colleges, met Muslim students who wanted to join SIMI, recruited new members and carried out self-defence training for new recruits.
- He said that the self-defence training was a form of military training but they did not use guns and only used knives to train for self-defence.

- He said that he was aware that SIMI was a banned organisation in India.
 - He said that he has been to prison between 20 to 25 times with the longest time he spent in custody being 60 days. He said that he has arrested by the police for causing clashes between Hindus and Muslims.
25. [In] August 2011 the delegate sent a natural justice letter to the applicant requesting the applicant to comment on the following Departmental information:
- The purpose of his claimed travel to the United Kingdom and why did he state in his protection visa application (Form 80) that he was denied entry to the United Kingdom [in] October 2009.
 - The Department had information that [in] July 1999 the applicant previously applied for an Australian visa using [Alias B]. The visa was refused [in] August 1999 due to the submission of non bona fide documents to the department.
 - Departmental information that the applicant entered Australia [in] September 1999 using [Alias C].
 - The applicant's claim that he was in hiding from July 2008 until August 2010 as the police were looking for him, yet he was able to travel to Australia and then back to India and return to Australia during this time period without detection or apprehension.
26. [In] September 2011 the applicant provided the following response to the Department's letter:
- He was "instructed" to obtain a United Kingdom visa and the application was rejected due to insufficient documents.
 - To his knowledge, his application to Australia was never rejected and his first entry to Australia was [in] November 2009.
 - He did not alter his identity and he was never refused entry to Australia.
 - He did not apply for the protection visa [in] November 2009 since he was not known or targeted by the police or the government of India at the time.
 - He was strictly "under organisation's instructions" and always feared for his life.

Delegate decision

27. After considering all the evidence, including the applicant's response to the natural justice letter sent by the Department, the delegate refused the protection visa application.

28. The delegate found that the applicant feared harm for the reason of political opinion and religion and made the following findings:
- The applicant has chosen to express his political opinions through a terrorist organisation which was banned in India. The delegate notes that the applicant joined SIMI in the 1990's before it was banned but noted that country information suggested the organisation had already turned to terrorism by the early 1990's (CIS19056 [5.5]) and it would be likely that the applicant, as a member, would have been aware of this. The delegate noted that when SIMI was banned in 2001 many of its members were detained and many went underground (CX207305 [5.25]). The delegate found that the applicant would have known that SIMI was a banned organisation and noted that the "telephone smuggling incident" to be a clear case of the applicant knowingly choosing to break the law in India.
 - The delegate found that the harm feared by the applicant to be prosecution under a law of general application. The delegate had regard to country information regarding increased terrorist activity in India since the 2011 Mumbai bombings and the 2008 Mumbai attacks which killed more than 160 people.
 - The delegate found that with the high level of terrorist attacks in India resulting in the deaths of many of its citizens the laws in India are aimed at stopping terrorist attack rather than being aimed at persecuting certain groups.
 - In conclusion, however, the delegate found that the applicant was not credible in his claims and found that he was not a member of SIMI for ten years if at all.

Application for review

29. [In] September 2011 the applicant applied to the Tribunal to review the delegate's decision. On [the following day] the Tribunal wrote a letter to the applicant acknowledging his review application. The letter invited the applicant to provide material or written argument for the Tribunal to consider.
30. [In] March 2012 the Tribunal invited the applicant to give oral evidence and present arguments at a hearing [in] May 2012.
31. [In] April 2012 the applicant's registered migration agent emailed the Tribunal requesting to reschedule the hearing date. [In] April 2012 the Tribunal agreed to the request and rescheduled the hearing to [a date in] June 2012. The applicant did not appear before the Tribunal on the day and at the time and place at which he was scheduled to appear for hearing.
32. On the morning of the hearing, the Tribunal received a facsimile from [a] Medical Centre dated [the previous day], advising that the applicant was receiving medical treatment and he will was unfit for normal duties. The Tribunal rescheduled the hearing to [a further date in] June 2012.
33. [Three days prior to the hearing] the applicant submitted approximately 500 pages of open source country information. The Tribunal has had regard to the information provided by the applicant and notes the following documents: 2007 National Project

on Prevention of Torture in India, India National Human Rights Commission report regarding torture, illegal detention and unlawful arrest from 1993 to 2005, untitled publication regarding India's Muslim population, various internet downloads and reports regarding SIMI, People's Union for Civil Liberties, Tamil Nadu: The rise of Islamic Fundamentalism and various media reports on police corruption in India and deaths in police custody.

34. The applicant also provided a copy of his current Indian passport ([number deleted: s.431(2)]) and a copy of RRT country research response number IND30143 dated 15 May 2006 regarding the Tamil Nadu, State Protection, Muslims and SIMI.

Review hearing

35. The applicant appeared before the Tribunal on [the scheduled date in] June 2012 to give evidence and present arguments. The Tribunal hearing was conducted by video conference from Adelaide with the assistance of an interpreter in the Tamil and English languages.
36. The applicant said that his protection visa application was completed with the assistance of a migration agent. He said that the contents were accurate and he did not wish to make any changes to his claims.
37. The applicant said that he was born in [Locality 1], Tamil Nadu India on [date deleted: s.431(2)]. Both his parents are alive and live in [Locality 1] and sell [produce] and he kept in regular contact with his family.
38. The applicant said that he first arrived in Australia in 2009 and he returned back to India in September 2009. He then returned to Australia for the second time in 2010.
39. The applicant said that his mother had visited Australia on [a number of] occasions and her last trip to Australia was in 2011.
40. The applicant said that he married [in] 2005 and had [number of children deleted: s.431(2)] in India and owned his own house in [Locality 1]. The Tribunal asked the applicant how his family are able to financially support themselves when he is in Australia. The applicant said that his father was helping to support his family.
41. The Tribunal asked the applicant about his education and employment in India. The applicant said that he studied to the fifth level and left school when he was about 12 years old. After he left school he [worked] but did not attend any formal training.
42. The Tribunal asked the applicant about his religious beliefs. He said he was a Muslim and his family was very religious.
43. He said he said that he travelled to Australia on his Indian passport which he claimed was his true identity.
44. The applicant said [a relative] has been in Australia for over 10 years and he was currently living with [them]. The Tribunal asked the applicant to comment on the circumstances in which his [relative] travelled to Australia. The applicant at first said that he did not know the circumstances in which his [relative] travelled to Australia. The applicant said that when he was in India he lost contact with his

[relative] until one day his [relative] called him from Australia. The applicant could not recall when his [relative] made the telephone call.

45. The Tribunal asked the applicant why he came to Australia in 2009. The applicant said that he had not seen his [relative] for many years and his [relative] sponsored him to Australia he then returned back to India and continued to [work].
46. The Tribunal asked him why he returned to Australia in 2010. The applicant said that he was a member of SIMI in India. He said that SIMI is a Muslim organisation which speaks to people about Islam. He said that Muslims are a minority in India and are denied employment opportunities.
47. The Tribunal again asked the applicant to explain why he came to Australia. The applicant said that he has been a member of SIMI since 1998 and in about 2006 became [an office-bearer] of SIMI for [District 2].
48. The Tribunal again asked the applicant to explain how his membership of SIMI was relevant to his decision to come to Australia. The applicant said that [in] July 2010 the police searched his house in India and found his SIMI membership documents. He said that the police also took [false passports], about 1,000,000 INR and thousands of US dollars and thousands of Euros which was kept in cash at his house. The Tribunal asked him why he had so much money. The applicant said that he was [an office-bearer in District 2] and needed the money to help the poor. He said that many Muslims are put in gaol and he would help their families. The Tribunal asked the applicant what was the purpose of the false passports. The applicant said that the passports were in false names but had his photograph. He said that he was required to travel overseas to raise fund for SIMS and he would travel using the false documents. The Tribunal asked the applicant when he travelled and to which countries. The applicant said that he could not recall exact dates but was able to recall that he had travelled to [a number of countries between 2006 to 2008].
49. The Tribunal asked he applicant how the trips were organised. The applicant said that he would be ordered by SIMI to go to a country and bring money back. He said that he was told to go to a hotel overseas and would wait for two days and someone would ring him and give him instructions. He said that he would leave the room key at the reception desk and someone would bring up a package into his room and leave it on his bed. He did not open the packages but knew it contained money because that's what he was told. He said that someone would ring him and tell him that it was safe to travel back to India and he never had any trouble at the airport.
50. The Tribunal asked the applicant if he got paid for the work he did. The applicant said that he did not get paid but could take money that he had in his possession. The Tribunal asked the applicant why he had to take part in such a complicated arrangement when he could open a bank account and have the money transferred electronically from overseas instead of travelling around the world on false passports. The applicant said that he was a member of an organisation and did what he was told.
51. The Tribunal asked the applicant about his duties and role as [an office-bearer]. The applicant said that he would attend Islamic collages and talk about Allah and Islam, he would tell people about the consequences if they did not follow Allah, he would

visit people who had been imprisoned illegally, he would visit their families and provide them with financial assistance, he would teach members self-defence so people could defend themselves with knives and batons.

52. The Tribunal asked the applicant how he had time to be [an office-bearer] of SIMI, [work] and travel overseas. The applicant said that his [job] was part time in the evenings and he had the rest of the day free.
53. The Tribunal asked the applicant to explain what happened after his house was raided by the police in July 2010. The applicant said that he was not home at the time but he found out about the raid from his mother. He said that he went into hiding, changed his telephone and moved to another town where he lived with friends. The Tribunal asked the applicant what happened to his wife and [children]. The applicant said that the police tried to take his wife and children but the neighbours protested and the police left them alone. The Tribunal asked the applicant how he knew that his SIMI documents, false passports and money were taken by the police if he was not at home. The applicant said that his mother told him what the police took from his house.
54. The Tribunal asked the applicant why he decided to come to Australia. The applicant said that he wanted to stay in India and serve his people. He said that he had to leave India because he feared for his life because there were false allegations against him and the police suspected him of being a terrorist because they found his SIMI membership papers, false passports when they raided his house. The applicant said that after “September 11,” the Indian president banned SIMI and the police had been looking for him.
55. The Tribunal asked the applicant if he had participated in any terrorist activities. The applicant said that his religion does not allow him to be involved in terrorist acts. The Tribunal asked the applicant why he would be accused of terrorism. The applicant said that all Muslims are branded terrorists.
56. The Tribunal asked if his fear of harm in India was because he was a Muslim or because he was a member of SIMI. The applicant said that his problems related to him being a member of SIMI.
57. The applicant said that he was imprisoned in India on 20 to 25 occasions. The Tribunal asked the applicant to provide evidence about the times he was imprisoned.
58. The applicant said that he was first imprisoned in 1993 when he was [age deleted: s.431(2)]. He said that he had problems with the police and was taken into custody but his father came to negotiate with the police and he was released. He said that up to 1997 he was in custody on 9 to 10 occasions. The Tribunal asked the applicant to explain why he would have been imprisoned. The applicant referred to the Hindu festival of Ganesha which would take place each year in [Locality 1]. He said that Hindus would take part in a procession through streets which were occupied by Muslims and provoke their community. He said the procession had to finish the procession before a certain time but it never did and he and other Muslim men would go to the police and demand that they stop the procession. The police would ignore him and he would throw rocks and try and disrupt the procession. He said this continued until 2008 and resulted in him being arrested and detained.

59. The Tribunal asked the applicant if he was convicted off any criminal offences. The applicant said that he was not convicted but would be taken into custody for two to three days without any questioning and he would come before a judge who would release him. The Tribunal asked the applicant about the longest time he spent in custody. The applicant said that he had spent 60 days in custody but he could not recall the date. He said there were problems between Muslims and Hindus and he was charged with cutting people with knives and looting. He said he went before the court but the judge did not accept the charges. However, he was still kept in custody for 60 days because the police complained.
60. The Tribunal told the applicant that it had concerns about lack of detail in his evidence. The Tribunal asked the applicant to clarify his evidence and provide further detail regarding his claims that he was arrested between 20 to 25 times, when this occurred and why he was detained by the police. The applicant said that the Indian police are corrupt and different from police in Australia. The Tribunal asked the applicant why he had problems with the police. The applicant said it was because of corruption and his Muslim religion.
61. The Tribunal asked the applicant what other experiences he had in India which cause him fear to return. The applicant said that when he was in gaol he met a man call [Mr D] who had been in gaol for 10 years and was unable to contact his family. The man pleaded with him to help him get in contact with his family and asked for a mobile phone. The applicant said that he purchased a mobile phone, smuggled it into gaol and gave it to [Mr D].
62. The Tribunal asked the applicant how he smuggled the phone into gaol. The applicant said that he took the phone apart and [concealed] it. The Tribunal asked the applicant why he would conceal the phone in a way that would damage it. The applicant said that he did not ask any questions just did what he was told and that's the way things are done in India.
63. The applicant said that the phone was discovered, [Mr D] was interrogated and the police demanded to know his name. The applicant said [Mr D] did not know his name but there was video footage of him and the police knew his identity and were after him.
64. The Tribunal asked the applicant how he knew that the police discovered the phone and were after him. The applicant said that there was another man in gaol who he later met at a bus stop and this person told him what had happened and that the police were after him. The Tribunal asked the applicant if he knew the name of the other person who was in gaol and told him all details. The applicant said that he did not know the person's name.
65. The Tribunal asked the applicant if there were any other incidents he would like to discuss that cause him fear to return to India. The applicant said that he had a friend who was an Indian customs officer who would help him get through customs when he was bringing money back to India. He said that the customs officer was a member of a terrorist organisation called the *Maoist Communist Party of India* and had been taken into custody by the police. The applicant said that he feared that the police will become aware of his connection with the ex-customs officer and he would be arrested. The Tribunal asked the applicant when the ex-customs officer was taken

into custody. The applicant said he did not know and after further questioning by the Tribunal said it was in 2008 and knew about the arrest because he read about it in the newspaper.

66. The Tribunal asked the applicant why he was able to travel in and out of India on two occasions if he was worried that the police were looking for him. The applicant then changed his evidence and said the ex-customs officer was arrested in 2010. The Tribunal asked the applicant how he knew that the customs officer was arrested.
67. The Tribunal asked the applicant who he feared harm from in India. The applicant said it was the police. The Tribunal asked the applicant why he feared harm. The applicant said it was because he was member of a banned organisation. He was an activist involved spreading propaganda and would attend Islamic colleges and because the police raided his house found SIMI documentation and would have become aware that he was involved in bringing in foreign currency illegally into India.
68. The Tribunal asked the applicant to comment on country information referred to in the delegate's decision regarding SIMI being a banned terrorist organisation which has been associated with many bombing attacks in India since it was banned in 2001. The applicant said that it was never proven that SIMI was involved in any terrorist acts in India and no one has been found guilty of the Mumbai bombings. The applicant said that SIMI is not involved in any terrorist activities and the police in India are corrupt.
69. The applicant said that he came to Australia as a representative of SIMI. The applicant said that the delegate accepted that he was member of SIMI and therefore his life was in danger if he went back to India because he would be arrested as a terrorist. The Tribunal explained to the applicant that the delegate concluded that he was not a credible in his claims and was not a member of SIMI.

Section 424AA

70. Pursuant to s.424AA of the Act the Tribunal formally put to the applicant adverse information regarding his visa history and past travel to Australia as set out in paragraph 22 above. The Tribunal explained to the applicant that subject to what he had to say, the information would be the reason or part of the reason for affirming the decision under review. The Tribunal explained that the information is relevant because it would cause the Tribunal to find that the applicant had not been truthful in his claims and the Tribunal may find that the applicant is not a witness of credit.
71. The Tribunal advised the applicant that he could ask for further time before he had to respond to the adverse information.
72. The applicant chose to respond at the hearing and said that he had never entered Australia before 2009 and the Department must have him confused with someone else. He said SIMI must have used his identification documents and created false passports for other members to travel to Australia.
73. The Tribunal asked the applicant why he did not advise the Department that SIMI had used his documents. The applicant said that the Department had never advised

him that he was alleged to have used false document to enter Australia. The Tribunal referred the applicant to the natural justice letter sent to him [in] August 2011 and his response. The applicant said that the information was not true so there was nothing for him to respond about.

74. The Tribunal put country information to the applicant that SIMI members could only stay in the organisation until they were 30 years old and according to his evidence he became [an office-bearer] after he turned 30. The applicant said that after the terrorist acts of 11 September 2001 SIMI was banned in India and the organisation's membership dropped and they changed the rules to allow members to stay on after they turned 30.
75. The Tribunal asked the applicant why he did not travel to Australia with his family if he feared harm in India. The applicant said that he did not enter Australia legally and had to pay 1,000,000 INR to immigration officers. The applicant then clarified his evidence and said that he left India with the assistance of an immigration officer who he paid. He said that the officer secretly smuggled him into the airport so he could avoid being detected by the police. Once he was inside the airport he was given his bags and passport. He said that he could not take his family because he could have been caught.
76. The Tribunal asked the applicant why he travelled under his real name if he feared the authorities were after him. The applicant said that he was assisted by the immigration officer which was why he was not detected by the authorities in India.
77. The Tribunal asked the applicant how he was able to arrange a visa in his real name in order to come to Australia without coming to the attention of the authorities. The applicant said that an agent arranged the visa and he paid money to the immigration official which enabled him to leave the country.
78. The Tribunal offered the applicant more time to provide any further evidence to support his claim. The applicant said that he did not require more time and provided the Tribunal with names of other prisoners who he had met while he was in custody. He said that the prisoners were not members of SIMI but has similar problems with the authorities in India.

Country Information

SIMI

79. The UK Board Agency Country of Origin Information (COI) Report 30 March 2012, provides the following information about non-government armed groups in India:

The Students Islamic Movement of India (SIMI) was formed in Aligarh, in Uttar Pradesh state, in 1977. Initially SIMI simply attempted to promote morality campaigns and a conservative Islamic lifestyle that did not emulate the West. SIMI attracted increasing support among Muslim youths and, according to Indian authorities, began preaching a more conservative interpretation of Islam and advocating violent "jihad" to protect the rights of Muslims. "India's central government banned SIMI after September 11, 2001. Indian officials contend that SIMI has continued its operations despite the ban, often through front organizations, and receives funding primarily from sources in the Persian Gulf that support Islamist

militancy. They also allege that some SIMI members have received training and instructions from Pakistan-based groups such as LeT and JeM, and have provided safe houses for militants from LeT, JeM, HUJI, and others.” [26k] (p17-18)

Muslims in Tamil Nadu

80. There are no reports of the state’s Muslim population being restricted in Tamil Nadu in any significant way in terms of political freedom. As elsewhere in India, police are to contain the operations of proscribed militant Islamic groups, including the Jammu and Kashmir Liberation Front (JKLF)¹ and the Students Islamic Movement of India (SIMI).² Mainstream movements like the IUML are operating throughout the state without difficulty; and, further to this, the 3.47 million Muslims which inhabit Tamil Nadu (5.6% of the Tamil Nadu population according to 2001 census figures)³ enjoy favourable levels of access to education and employment compared to other Indian states.⁴
81. In terms of the level of security enjoyed by Muslims in Tamil Nadu more generally, some Muslim communities in Tamil Nadu have been affected by localised outbreaks of communal violence in the past. The May 2006 state assembly elections saw the IUML contest three constituencies as part of its electoral arrangements with the DMK⁵ but, in the end, the IUML was successful in having only one candidate elected as a DMK member of the Tamil Nadu legislative assembly (this victory occurred in the seat of Aravakurichi,⁶ a district in central Tamil Nadu and in which there reportedly exists a concentrated Muslim vote bank in the area of Muslim-majority Pallappatti).⁷ In the recent national elections, held over April–May 2009, the IUML again contested the polls as part of the DMK and was allocated only the one seat to contest,⁸ this being the northern Tamil Nadu constituency of Vellore

¹ ‘JKLF recruiting outfit busted in TN’ 2004, *The Deccan Herald* online edition, 30 October <http://67.18.142.206/deccanherald/oct302004/n10.asp> – Accessed 20 January 2006 –

² Although there have been claims that certain groups, such as the *Manitha Neethi Pasarai* (MNP; or the Human Justice Forum) have been unjustly targeted by Tamil Nadu police as a SIMI front organisation. For background on the matter, see: Subramanian, T.S. 2007, ‘Building new bases’, *Frontline*, Volume 24, Issue 24, 8-21 December <http://www.flonnet.com/fl2424/stories/20071221500800700.htm> – Accessed 31 July 2008–; RRT Country Research 2006, *Research Response IND30453*, 25 August –

³ Prime Minister’s High Level Committee, Government of India 2006, *Social, Economic and Educational Status of the Muslim Community of India*, Indian Ministry of Minority Affairs website, November, p.273 http://minorityaffairs.gov.in/newsite/reports/sachar/sachar_comm.pdf – Accessed 10 April 2008 –

⁴ Prime Minister’s High Level Committee, Government of India 2006, *Social, Economic and Educational Status of the Muslim Community of India*, Indian Ministry of Minority Affairs website, November, pp.58, 162 http://minorityaffairs.gov.in/newsite/reports/sachar/sachar_comm.pdf – Accessed 10 April 2008 –

⁵ Though there was some subsequent controversy between the DMK and the IUML in this regard. The DMK had reportedly allocated the seats of Aravakurichi, Palayamkottai and Vaniambadi to the IUML but subsequently fielded a DMK identity in the seat of Palayamkottai (for further information, see: ‘Constituency list of DPA partners’ 2006, *The Hindu*, 24 March <http://www.thehindu.com/2006/03/24/stories/2006032412750400.htm> – Accessed 9 February 2010 –; ‘DMK to seek re-election from Palayamkottai, IUML indecisive’ 2006, *One India News*, 31 March <http://news.oneindia.in/2006/03/31/dmk-to-seek-re-election-from-palayamkottai-iuml-indecisive-1143814036.html> – Accessed 9 February 2010 – ‘Congress cadres not to accept “outsider”’ 2006, *The Hindu*, 4 April <http://www.hindu.com/2006/04/04/stories/2006040410230300.htm> – Accessed 9 February 2010 –

⁶ Renganathan, L. 2006, ‘DMK alliance wins three seats’, *The Hindu*, 12 May <http://www.hindu.com/2006/05/12/stories/2006051216450200.htm> – Accessed 9 February 2010 –

⁷ Renganathan, L. 2006, ‘Multiple factors at play in Karur district’, *The Hindu*, 26 April <http://www.hindu.com/2006/04/26/stories/2006042608160400.htm> – Accessed 9 February 2010 –

⁸ Jagannathan, V. 2009, ‘DMK’s hold on Congress likely to tighten’, *Thaindian*, source: *Indo-Asian News Service*, 16 May http://www.thaindian.com/newsportal/politics/dmks-hold-on-congress-likely-to-tighten_100193554.html – Accessed 9 February 2010 –

which the nominated IUML member subsequently won under the DMK symbol.⁹ In the Tamil Nadu capital of Chennai, at the level of local government, IUML candidates reportedly hold “10 per cent of the total seats” as part of power sharing arrangements with the DMK.¹⁰ In addition to its ongoing electoral activities in Tamil Nadu under the DMK symbol¹¹ the IUML leadership has recently announced that it will launch an IUML Dalit vehicle, the Dalit League, in attempt to win seats reserved for scheduled castes.¹²

Muslims and political freedom in Tamil Nadu

82. Regarding Muslims in Tamil Nadu more generally, there are no reports of the state’s Muslim population being restricted in any significant way in terms of political freedom. As elsewhere in India, police are working in Tamil Nadu to contain the operations of any proscribed militant Islamic groups, including the as the Jammu and Kashmir Liberation Front (JKLF)¹³ and the SIMI.¹⁴ Nonetheless, and as is noted above, mainstream movements like the IUML are operating throughout the state of Tamil Nadu without complication; and, further to this, the 3.47 million Muslims which inhabit Tamil Nadu (5.6% of the Tamil Nadu population according to 2001 census figures)¹⁵ enjoy favourable levels of access to education and employment compared to other Indian states.¹⁶

FINDINGS AND REASONS

Does the applicant have a well-founded fear of persecution for a Convention related reason?

83. The mere fact that a person claims to fear 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

⁹ ‘DMK front makes a clean sweep in Vellore’ 2009, *The Hindu*, 17 May

<http://www.thehindu.com/2009/05/17/stories/2009051753950300.htm> – Accessed 9 February 2010 –Muruganandham, T. 2009, ‘DMK front led in 157 Assembly seats’, *Express Buzz*, 21 May

<http://www.expressbuzz.com/edition/story.aspx?Title=DMK+front+led+in+157+Assembly+seats&artid=CGbMzW93%7CU M=&SectionID=vBlkz7JCFvA=&MainSectionID=vBlkz7JCFvA=&SEO=Lok+Sabha+elections&SectionName=EL7znOx BM3qzgMyXZKtxw==> – Accessed 10 February 2010 –

¹⁰ ‘Restore rotation system for Chennai Mayor post: IUML’ 2006, *The Hindu*, 11 September

<http://www.hindu.com/2006/09/11/stories/2006091109060400.htm> – Accessed 10 February 2010 –.

¹¹ ‘IUML candidate replaced’ 2009, *The Hindu*, 11 April

<http://www.thehindu.com/2009/04/11/stories/2009041154100400.htm> – Accessed 10 February 2010 –

¹² ‘Dalit League planned’ 2009, *The Hindu*, 27 July <http://www.thehindu.com/2009/07/27/stories/2009072754560500.htm> – Accessed 10 February 2010 –

¹³ ‘JKLF recruiting outfit busted in TN’ 2004, *The Deccan Herald* online edition, 30 October

<http://67.18.142.206/deccanherald/oct302004/n10.asp> – Accessed 20 January 2006 –

¹⁴ Although their have been claims that certain groups, such as the *Manitha Neethi Pasarai* (MNP; or the Human Justice Forum) have been unjustly targeted by Tamil Nadu police as a SIMI front organisation. For background on the matter, see: Subramanian, T.S. 2007, ‘Building new bases’, *Frontline*, Volume 24, Issue 24, 8-21 December

<http://www.flonnet.com/fl2424/stories/20071221500800700.htm> – Accessed 31 July 2008–; RRT Country Research 2006, *Research Response IND30453*, 25 August –

¹⁵ Prime Minister’s High Level Committee, Government of India 2006, *Social, Economic and Educational Status of the Muslim Community of India*, Indian Ministry of Minority Affairs website, November, p.273

http://minorityaffairs.gov.in/newsite/reports/sachar/sachar_comm.pdf – Accessed 10 April 2008 –

¹⁶ Prime Minister’s High Level Committee, Government of India 2006, *Social, Economic and Educational Status of the Muslim Community of India*, Indian Ministry of Minority Affairs website, November, pp.58, 162

http://minorityaffairs.gov.in/newsite/reports/sachar/sachar_comm.pdf – Accessed 10 April 2008 –

that all of the statutory elements are made out: *MIEA v Guo & Anor* (1997) 191 CLR 559 at 596.

84. Although the concept of onus of proof is not appropriate to administrative inquiries and decision-making (*Yao-Jing Li v MIMA* (1997) 74 FCR 275 at 288), 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: *Prasad v MIEA* (1985) 6 FCR 155 at 169 70; *Luu & Anor v Renevier* (1989) 91 ALR 39 at 45.
85. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant: *Randhawa v MILGEA* (1994) 52 FCR 437 at 451.
86. In determining whether an applicant is entitled to protection in Australia the Tribunal must first make a finding of fact on the claims he or she has made. This may involve an assessment of the applicant's credibility and, in so doing, the Tribunal is aware of the need and importance of being sensitive to the difficulties asylum seekers often face in recounting their experiences. 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.
87. On the other hand, as stated above, 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: *Randhawa v MILGEA* (1994) 52 FCR 437 at 451 per Beaumont J, *Selvadurai v MIEA & Anor* (1994) 34 ALD 347 at 348 Heerey J and *Kopalapillai v MIMA* (1998) 86 FCR 547.

The applicant's claims

88. In light of the applicant's prior migration history, the Tribunal has some concerns about the applicant's true identity. Tribunal accepted the applicant's evidence he entered Australia on an apparently valid and legally issued Indian passport in his own name. The Tribunal accepts that the applicant is a national of India.
89. In summary the applicant claims he fears the police in India because he is a member of a banned organization, and will be arrested as a terrorist if he returns to India.
90. The Tribunal accepts that the applicant was born in India in the state of Tamil Nadu, that he is Muslim and that he [worked] in India. Beyond this issue, however, the Tribunal does not believe any of the claims made by the applicant or that he genuinely holds fear of any harm should he return to India.
91. Tribunal does not accept that the applicant has suffered harm in the past or will suffer harm in the future because of his:
 - Muslim religion

- Political opinion as a member of SIMI
- Imputed political opinion variously described as an Islamic terrorist or Muslim terrorist.

Plausibility of the applicant's claims

92. The Tribunal has a number of concerns about the applicant's evidence, which cause the Tribunal to find that the applicant is not a credible witness and has not been truthful in relation to his experiences in India, his reasons for leaving India and his fears about returning to India.
93. In reaching this view, the Tribunal has had regard to the applicant's inability to recall important dates and details of his claim, inconsistencies within the applicant's evidence and the implausibility of important parts of the applicant's claims.
94. The Tribunal accepts the Department's findings that in July 1999 the applicant attempted to travel to Australia on Temporary Business Short Stay UC 456 visa under the false name [Alias B] but the Department refused his visa due to non bona fides. The Tribunal accepts the Department's findings that the applicant successfully entered Australia on a UC 456 visa in September 1999 in the false name of [Alias C] and departed Australia in April 2004 after coming to the attention of the Department.
95. The Tribunal rejects the applicant's explanation that another member of SIMI used his personal details to travel to Australia as detailed above. The Tribunal makes these findings based the fact that the false names and dates of birth referred to above are derivatives of the applicant's current name and date of birth. The Tribunal also notes that the applicant has admitted that he was denied entry into the United Kingdom in October 2009 due to issues associated with his travel documents.
96. The Tribunal does not accept that the applicant was or is a member of SIMI. The Tribunal found the applicant's evidence regarding his involvement in SIMI vague and lacking in detail. The applicant was unable to provide any documentation to substantiate his membership of SIMI despite claiming that he was an active member of SIMI since 1998 and was [an office-bearer] of SIMI for 10 years. Given the applicant's claimed long association with the organisation the Tribunal would have expected the applicant to be able to demonstrate an intimate and detail knowledge of the day to day functions of the organisation.
97. The applicant was only able to provide general and vague evidence about the times he claims to have travelled overseas to raise funds. He claimed to have travelled to [a number of] countries but when questioned about the details of the travel the Tribunal found the applicant's answers to be vague and lacking in details. For example, he was unable to say exactly when he travelled or at who's direction. He claimed he travelled to [one country] every 3 months and then changed his evidence and claimed he travelled on one occasion in 2006. The Tribunal found the applicant's claim that he would be contacted by anonymous callers when he arrived at overseas hotels and provided with unopened packages which contained large amounts of cash to be implausible.

98. The applicant claimed to have been imprisoned on 20 to 25 occasions however his description of the instances of imprisonment were vague and lacking in detail. For example, he said that in 1993 he taken into custody but released after his father attended at the prison. He said he was imprisoned between 9 to 10 times up to 1997 as a result his actions in Hindu and Muslim riots. When asked if could recall when he was imprisoned for 60 days the applicant told the Tribunal that he could not recall the date. The Tribunal does not accept the applicant's evidence that he was imprisoned between 20 to 25 occasions due to his Muslim beliefs or because he took part in anti-Hindu protests or because he was a member of SIMI.
99. The Tribunal did not accept the applicant's evidence that he came to the attention of the authorities in July 2008 when he agreed to assist [Mr D], a former prison inmate, by [smuggling] a mobile phone into prison. The Tribunal did not accept the applicant's evidence that he became aware the authorities were looking for him when he met a former prison inmate at a bus stop. The Tribunal found the applicant's evidence fanciful and lacking in credibility.
100. The Tribunal finds that the applicant's fear of the authorities after the July 2008 incident and subsequent hiding is inconsistent with his decision to return to India in December 2009. The Tribunal notes that despite the applicant's claim that he had to go into hiding he was able to depart India in November 2009 using his real identity. The Tribunal further notes that despite the applicant's claims that his life was in danger if he returned to India in December 2009 and did not depart until August 2010. The Tribunal finds the applicant's explanation that a corrupt customs official was able to smuggle him into the airport to be implausible, vague and lacking in detail.
101. The Tribunal did not find that applicant's evidence that as a SIMI member he began to fear the Indian authorities after the 11 September 2001 terrorist attacks in the USA. The Tribunal notes that the applicant was in fact in Australia between [September] 1999 and [April] 2004 and has provided no evidence of his involvement in any SIMI activities or political activism during this time.
102. Having considered the applicant's written claims and oral evidence, the Tribunal does not accept the applicant was a member of SIMI or has been persecuted because of his Muslim religious beliefs. It follows that the Tribunal does not accept the applicant was targeted or harmed by any other person because of his religious beliefs, membership of SIMI or imputed political opinion variously described as an Islamic terrorist or Muslim terrorist. Having regard to the country information details in paragraphs 80 to 83 above, the Tribunal does not accept the applicant will face a real chance of persecution in the reasonably foreseeable future for these reason or any other reason.
103. The Tribunal is not satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution within the meaning of the Convention.
104. As the Tribunal has found that the applicant does not meet the refugee criterion in s.36(2)(a) of the Act, the Tribunal considered whether he may nevertheless meet the criteria for the grant of a protection visa pursuant to the complementary protection legislation referred to above. In this regard, the Tribunal has considered whether there are substantial grounds for believing that, as a necessary and foreseeable

consequence of the applicant being removed from Australia to a receiving country, there is a real risk he will suffer significant harm. Based on the findings above in relation to the implausibility of any threat to him the Tribunal does not accept there are substantial grounds for believing there is a real risk that the applicant will suffer significant harm from the Indian authorities or the police if he were to return to India.

105. The Tribunal is not satisfied that it has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's being removed from Australia to another country, that is India, that there is a real risk he will suffer significant harm. The applicant does not satisfy the requirements of s.36(2)(aa) of the Act

CONCLUSIONS

106. 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).
107. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under s.36(2)(aa).
108. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2) for a protection visa.

DECISION

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